Heard 1-521 Judge Davis
Feb 2.

Affirmed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 134.

CHRISTIAN S. EYSTER, PLAINTIFF IN ERROR,

vs.

THOMAS GAFF AND JAMES W. GAFF.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED JANUARY 19, 1874.

~~Davis~~

Miller

SUPREME COURT OF THE UNITED STATES.

No. 134.

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INDEX.

	Original.	Print.
Transcript from Arapahoe County district court	3	1
Assignment of errors	113	66
Joinder in error	119	69
Order of court for hearing	120	69
Order of court for further hearing	121	70
Cause submitted	121	70
Judgment of court reversing	122	70
Petition for rehearing	123	71
Order of court setting aside judgment and to file arguments	126	72
Stipulation to amend bill of exceptions	127	73
Petition of John Mechling to be made a party	128	73
Order of court denying petition	131	74
Final judgment	132	75
Opinion of court upon the petition of John Mechling	133	75
Opinion of court	135	76
Dissenting opinion of Belford, J	137	77
Affidavit as to amount in controversy	156	85
Bond approved	157	86
Original writ of error	159	87
Original citation	161	87
Original citation	163	88
Præcipe for transcript of record	165	89
Clerk's certificate	166	89
Bond	168	90
Bond	172	91

1 In the supreme court of Colorado Territory.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

At a stated term of the supreme court of Colorado Territory, begun and held at the city of Denver, in said Territory, on Tuesday, the eleventh day of February, A. D. 1873, it being the first day of the regular term, A. D. 1873, of said supreme court, pursuant to law—present, honorable Moses Hallett, chief-justice, and honorable Ebenezer T. Wells, associate justice, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—the following proceedings were had and entered of record in the following-entitled cause, to wit:

CHRISTIAN S. EYSTER, APPELLANT,
vs.
THOMAS GAFF AND J. W. GAFF, APPELLEES. } Appeal from district court, Arapahoe County.

Be it re'mbered that, to wit, on the tenth day of February, A. D. 1873, there was filed in the office of the clerk of said supreme court of Colorado Territory, a transcript of record with an assignment of errors thereto attached, which said transcript of record and as-
2 signment of errors are in the words and figures following, to wit:

3 TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, before the honorable Ebenezer T. Wells, associate-justice of the supreme court of said Territory, assigned to said judicial district, at a term thereof, begun and held at the court-house in Denver, in said county, on the second Tuesday (it being the thirteenth day) of June, A. D. one thousand eight hundred and seventy-one—present, honorable Ebenezer T. Wells, judge of said court, Merrick A. Rogers, district attorney of said judicial district, David J. Cook, sheriff of said county, George H. Mills, clerk of said court.

At which said term, among other things, proceedings were had in the following cause, to wit:

THOMAS GAFF ET AL.
vs.
CHRISTIAN S. EYSTER. } Ejectment.

District court summons.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

The people of the Territory of Colorado, to the sheriff of Arapahoe County, greeting:

We command you that you summon Christian S. Eyster, if he shall be found in your county, personally to be and appear before the district court of said Arapahoe County, on the first day of the next term thereof,

to be holden at the court-house in Denver, in said Arapahoe
4 County, on the second Tuesday of June, A. D. 1871, to answer unto Thomas Gaff and J. W. Gaff, in a plea of ejectment to the damage of said plaintiffs, as they say, in the sum of five thousand dollars, and have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness George H. Mills, clerk of our said court, and the seal thereof at Denver, aforesaid, this 2d day of June, A. D. 1871.

[SEAL.] GEORGE H. MILLS, *Clerk.*

(Indorsed:) District court summons. Docket No. 1970; page — and —— district court. Thomas Gaff et al. vs. Christian S. Eyster

TERRITORY OF COLORADO,
County of Arapahoe, ss:

June 2d, 1871.—I have duly executed the within, by reading the same to the within-named Christian S. Eyster, as I am therein commanded.

D. J. COOK,
By W. A. SMITH, *Deputy Sheriff.*

Fees: Service, .75; mileage, .50; return, .75—2.00.

Filed in the district court this 2d day of June, A. D. 1871.

GEORGE H. MILLS, *Clerk.*

Declaration.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid to the June term thereof, A. D. 1871.

Thomas Gaff and J. W. Gaff, the plaintiffs in this suit, by Charles and Elbert, their attorneys, complain of Christian S. Eyster,
5 the defendant, of a plea wherefore the said defendant, with force and arms, &c., entered into the following-described premises, for that, heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and sixty-nine, the said plaintiffs were possessed of certain premises, situated in the city of Denver, county of Arapahoe, and Territory of Colorado, and described as follows, to wit, lots numbered one, two, three, four, five, and six, in block numbered ninety-eight in the east division of the city of Denver, county and Territory aforesaid, and being so possessed thereof, the said defendant, afterwards, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and sixty-nine, entered into said premises, and unlawfully with'olds from the said plaintiffs the possession thereof, and the said plaintiffs aver that they claim title to said premises in fee: Wherefore the said plaintiffs say they are injured, and have sustained damages to a large amount, to wit, the sum of five thousand dollars; and therefore they bring suit, &c.

SECOND COUNT.—And also for that, heretofore, on the first day of October, in the year of our Lord one thousand eight hundred and sixty-nine, the said plaintiffs were possessed of certain other premises, situated in

the city of Denver, county of Arapahoe, and Territory of Colorado, and described as follows, to wit, lots numbered one, two, three, four, five, and six, in block numbered ninety-eight, in the east division of the city of Denver, county and Territory aforesaid, and being possessed thereof, the said defendant afterwards, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and sixty-nine, entered into such possession, and that he, the said defendant, unlawfully withholds from the said plaintiff the possession thereof, and the said plaintiffs aver that they claim title to said premises in fee: Wherefore the said plaintiffs say that they are injured, and have sustained damages to a large
6 amount, to wit, the sum of five thousand dollars; and therefore they bring suit, &c.

CHARLES & ELBERT,
Attorneys for Plaintiffs.

(Endorsed:) 1770. Thomas Gaff and J. W. Gaff vs. Christian S. Eyster. Narr. Filed June 2d, 1871. G. H. Mills, clerk. Charles and Elbert for plaintiffs.

Plea.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, within and for the county of Arapahoe. To the June term, A. D. 1871.

THOMAS GAFF AND J. W. GAFF
vs.
CHRISTIAN S. EYSTER.

And the defendant, by M. M. Benedict, his attorney, comes and defends the wrong and injury, when alleged to have been done, &c., and says that he is not guilty of unlawfully withholding the said premises claimed by the plaintiffs in manner and form as alleged in said declaration; and of this he put himself upon the country.

JOHN MUKLING,
M. M. BENEDICT,
Defendant's Attorneys.

And the said plaintiff' do*th* the like.

CHARLES & ELBERT,
For Plaintiffs.

(Endorsed:) No. 1770. Thomas Gaff et al. vs. Christian S. Eyster. Plea filed June 19th, 1871. G. H. Mills, clerk.

7 *Finding of the judge.*

THOMAS GAFF ET AL.
vs.
CHRISTIAN S. EYSTER. } Ejectment.

Now, on this day comes the plaintiffs, by Messrs. Charles & Elbert, their attorneys, and said defendant, by M. Benedict, esq., his attorney, also

comes, and this cause, by agreement of said parties, having been set for trial by the court without the intervention of a jury, thereupon comes the evidence, after which, and the argument of counsel, the court finds that the said defendant is guilty in manner and form as the said plaintiffs have alledged against him, and that the said plaintiffs are entitled to the premises in the said declaration mentioned, to wit, lots number one, two, three, four, five, and six, in block number ninety-eight, in the east division of the city of Denver, in the county of Arapahoe, and Territory of Colorado, in fee-simple.

Judgment.

Therefore, it is considered by the court, that the said plaintiffs do have and recover possession of the said premises, to wit, lots number one, two, three, four, five, and six, in block number ninety-eight, in the east division of the city of Denver, in the county of Arapahoe, and Territory of Colorado, in fee-simple, and that they have a writ of possession therefore, and according to the form of the statute in such cases made and provided, and that they also recover their costs by them in and about this said suit in this behalf paid, laid out, and expended, taxed at , and have execution therefor; and thereupon the said defendant prays an appeal from the judgment herein to the supreme court of this Territory, which is allowed to him upon condition that, within ten days from this date, he file herein a good and sufficient appeal-bond, conditioned according to law, and with security to be approved by the clerk of this court, and day until sixty days from this date is given the said defendant in which to tender his bill of exceptions to the finding, judgment, and rulings of the court in this cause; and it is ordered by the court that, upon the said bill
8 of exceptions being allowed and signed by the judge of this court, the same be filed herein as of this date. It is further ordered by the court that the said appeal-bond be in the sum of five hundred dollars.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, in and for the county of Arapahoe, of the term, A. D. 1871.

THOMAS GAFF ET AL.
vs.
C. S. EYSTER. } Ejectment.

Bill of exceptions.

Be it remembered that, on the trial of this cause at the January term, A. D. 1872, of the said district court, before Hon. E. T. Wells, esq., judge of said court, by the said the Hon. E. T. Wells, judge, the said parties having theretofore waived the right to try the same cause by a jury, and having agreed that the said E. T. Wells, judge of said court, should and might try the said cause on the issues joined therein, and find according to the evidence produced before him according to law;

The plaintiffs, to maintain the issues on their part given in evidence to the said judge

The admission of the defendant that lots Nos. 1, 2, 3, 4, 5, and six in block 98, in the east division of the city of Denver, were within the limits

of the congressional grant of said city, and the same was then and there admitted by the defendant.

It was then admitted by the defendant that Book vol. T, produced in court from the office of the recoder of deeds of Arapahoe
9 County, was the record-book of said county, properly kept, &c., and the plaintiffs then, further to prove the issues in the said cause on their part, offered in evidence the certificate of the entry of the town site of the city of Denver recorded on said book on page one.

To the introduction of which into evidence the defendant then and there objected, by his counsel, for the following reasons:

First, the certified copy, and not the books, are the proper evidence, which objection was then and there overruled by the court; and to which ruling of the court the defendant then and there excepted, and an exception was allowed to him, and the record was read in evidence from the said book, of which the following is a copy:

"No. 26.] RECEIVER'S OFFICE AT DENVER CITY, C. T.,
"*May 6th*, 1865.

"Received from James Hall, as probate judge of Arapahoe County, Col. Ter., in trust for the several use and benefit of the rightful occupants and the bona-fide owners of the improvements of County , the sum of eleven hundred and ninety-six dollars and sixty cents, being in full for section thirty-three (33) and the west ½ of section thirty-four (34), save and except block number one hundred and forty-three (143), and lots 29, 30, 31, and 32 in block 42, and lots Nos. 28 and 29 in block 46, east division city, in township No. three south, of range No. 68 west, containing $957\frac{400}{1050}$ acres.

"C. B. CLEMENTS, *Receiver*."

$1,196.60.
Filed for record May 7th, 1865, at 1 o'clock a. m.

After which the plaintiffs, further to maintain the issues in the said cause on their part, produced Henry A. Clough, esq., as a witness, and who, being first duly sworn, on his oath says as follows:

Hon. HENRY A. CLOUGH sworn, says:

I reside in the city of Denver; I am probate judge of this county;
10 I have in my possession the filings on lots in the city of Denver under the town-site law; I have a filing on lots 1, 2, 3, 4, 5, and 6, in block 98, in the city of Denver, purporting to be by George W. McClure. This is the paper, producing it. It is admitted that the signature is that of George W. McClure.

Question. Do you know whether that is or not the general and ordinary form of filing in that office?

(Which question was then and there objected to by defendant's counsel, and the objection was then and there overruled by the court. To which ruling of the court the defendant then and there excepted, and an execution was allowed to him by the court.)

And the witness answers: The printed blank is the same as in the usual form; in these forms some of them say at the end after the printed words, as the owner thereof, some as the rightful occupant thereof, some as the rightful occupant and bona fide owner of the improvements, and in various ways.

Cross-examined:

Think there is no other paper on file relating to these lots. There is

an index to these filings. I have searched in the office, and find no other filings on these lots by McClure except this one. These filings are all numbered, and the index refers to the numbers. This filing is marked "A." Paper marked "A" is offered in evidence, of which the following is a copy, in the words & figures following, to wit:

(To the offering and reading in evidence of which paper the defendant, by his counsel, then and there objects, for the reason that the filing is not in compliance with the statute of Colorado; which objection is then and there overruled by the court, to which ruling of the court the defendant then and there excepted, and an exception thereto was then and there allowed to him, and said paper was read in evidence.) It was admitted that George W. McClure resided upon the premises in
11 question from 1862 to 1868, and improved the same, and the paper marked "A" was then read, of which the following is a copy:

No. 155.] To the probate judge of Arapahoe County:

I hereby apply for a deed to lots one, (1,) two, (2,) three, (3,) four, (4,) five, (5, and six, (6,) in block ninety-eight (98) east division, under the act of Congress entitled An act for the relief of the citizens of Denver, in the Territory of Colorado, approved May 28th, 1864, and claim the same as the owner thereof.

GEO. W. McCLURE.

DENVER, *May 25th*, 1865.

After which the plaintiffs, further to maintain the issues on their part in this cause, produced and offered to read in evidence, from record-book vol. 7 of the records of Arapahoe County, from page 93 of said book, deed from James Hall, probate judge of Arapahoe County, to George W. McClure, *from* the premises in question in this suit. (To the reading of which in evidence the defendant then and there objected, for the following reasons:

First. It does not show on its face a compliance with the acts of the territorial legislature.

Second. Because the records are partly written and partly printed.

Third. It is the original record instead of an exemplification.

(Which objections were then and there overruled by the court; to which ruling of the court the defendant then and there excepted, and an exception *and an exception* was allowed to him by the court,) and the record was read—a copy of which is as follows:

This indenture, made this (11th) eleventh day of August, A. D. one thousand eight hundred and sixty-five, by and between James Hall, probate judge of Arapahoe County, Colorado Territory, of the first part, and George W. McClure, of the same place, of the second part, wit-
12 nesseth: Whereas, by an act of Congress entitled An act for the relief of the citizens of Denver, in the Territory of Colorado, approved May 28th, A. D. 1864, the probate judge of said county of Arapahoe, was authorized to enter section number thirty-three, (33,) and the west half of section number thirty-four, (34,) in township number three south, of range number sixty-eight, west of the sixth principal meridian, in trust, as in said act is provided; and whereas James Hall, probate judge of said Arapahoe County, hath entered said land at the land-office in Denver City; and whereas the said party of the second part is entitled to the lots and parcels of ground hereinafter described, under the provisions of said act:

Now, therefore, in consideration of the premises, and of the sum of two and fifty one-hundredth dollars, by the said party of the second part to him paid, the said party of the first part, probate judge of said county, as aforesaid, and by virtue of the act of Congress aforesaid, doth grant and convey unto the party of the second part the following-described lots and parcels of ground, being a part and portion of the tract of land hereinbefore described, to wit, lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, and lot number nine, (9,) in block number sixty-nine. (69,) in the east division of the city of Denver: To have and to hold the above-described premises unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part, probate judge as aforesaid, hath hereunto set his hand and seal, at Denver aforesaid, this the day and year aforesaid.

JAMES HALL, [SEAL.]
Probate Judge.

13 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Omer O. Kent, a notary public in and for the county in the Territory aforesaid, do hereby certify, that James Hall, probate judge in and for said county, known to me to be the person described in and who executed the foregoing conveyance, and acknowledged that, as such trustee, he signed, sealed, and delivered the said conveyance as his act and deed, for the uses and purposes therein mentioned. Witness my hand and official seal, this 11th day of August, A. D. 1865.

[SEAL.] OMER O. KENT,
Notary Public.

Filed for record at 4¼ o'clock p. m. August 24th, 1865.

And afterwards, further to maintain the issues joined in this cause on their part, the plaintiffs offered in evidence a mortgage from George W. McClure to plaintiffs; also the certificate of acknowledgment and recording appended thereto, dated February 2d, 1867, a copy of which is here appended.

To which offers and to the reading in evidence of which mortgage the *the* defendent then and there objected, for the following reasons:

First. There is no proof of the execution of said mortgage.

Second. It is not accompanied by proof of the debt which it was given to s'ure.

(Which objections were then and there overruled by the court; to which ruling of the court the defendent then and there excepted, and an exception was then and there allowed to him.)

And the said mortgage was then read in evidence; copies of which are hereto annexed.

Mortgage.

14 This deed, made the second day of February, in the year of our Lord one thousand eight hundred and sixty-seven, between George W. McClure, of the County of Arapahoe and Territory of Colorado, of the first part, and Thomas Gaff and James W. Gaff, of Cincinnati, of the County of Hamilton and State of Ohio, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of eighteen thousand dollars to the said party of the

first part in hand paid by the said party of the second part, the receipt whereof is hereby confes'ed and acknowledged, hath granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey and confirm unto the said party of the second part, their heirs and assigns, forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following-described lots or parcels of land, situate, lying, and being in the County of Arapahoe and Territory of Colorado, to wit: Lots Nos. (23,) twenty-three, twenty-four, (24,) and twenty-five, (25,) in block number forty-six, (46;) and lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98,) all in the east division of Denver.

[Canciled revenue stamp, eighteen dollars—$18.00.]

To have and to hold the same, together with all and singular the appurtenances and privile*d*ges thereunto belonging or in any wise thereunto appertaining; and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigne*s* forever; and the said party of the first part the aforesaid tracts or parcels of land and premises unto the said parties of the second part, their heirs and assigns, against the claim, or claims, of all and every person whatsoever, and the said McClure, doth and will warrant and forever defend by these presents, provided, always, that these presents are upon this express condition, that if the said McClure, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said Thomas Gaff and James W. Gaff, their heirs, executors, or administrators, or assigns, the sum of eighteen thousand dol ars, in manner particularly specified in three notes of six thousand dollars each, having even date herewith, executed by the said George W. McClure to the said Thomas Gaff and James W. Gaff, then and thenceforth these presents and everything herein contained shall cease and be void, everything herein contained to the contrary notwithstanding.

In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first above written.

[SEAL.] GEORGE W. McCLURE.

Signed, sealed, and delivered in presence of—
CHAS. T. McCLURE.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Charles G. Cheever, a notary public in and for said county, in the Territory aforesaid, do hereby certify that George W. McClure, who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this second day of February, 1867.

[SEAL.] CHARLES G. CHEEVER.
Notary Public.

16 Mortgage-deed. George W. McClure to J. W. & Tho. Gaff.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I hereby certify that this deed was filed for record at 2 o'clock p. m., February 2d, 1867, and duly recorded in book 13, page 350.

CHAS. G. CHEEVER.

No. 5900. Fees 2.50$.

It was then admitted by the defendant, that James Hall, probate judge of Arapahoe County, entered the Denver town-site of which the lots in question are part, on the 5th of May, A. D. 1865, at the United States land-office in Denver, and that a patent was issued to him by the United States for the same thereafter.

And the plaintiffs rest.

Whereupon the defendant, to maintain the issues joined in this case for him, offered to read in evidence, to the court, a certified copy of the proceedings in the supreme court of Colorado Territory, for the district of Colorado, in bankruptcy, by which George W. McClure is discharged in bankruptcy, with accompanying schedules, dated May 9th, 1870; also, copies of orders, &c., therein.

Which offer, and the reading of which papers in evidence, was then and there objected to by the plaintiffs by their counsel, for the following reasons:

First. Certified copies are not the best evidence.

Second. Because the same are irrelevant, except to show bankruptcy of McClure and the appointment of an assignee. The assignee
17 took only an equitable title which cannot be set up here; which objections were then and there overruled by the court, and the papers offered were allowed to be read in evidence. To which ruling of the court the plaintiffs, by their counsel, then and there excepted, and an exception was then and there allowed to them by the court, and the papers were read in evidence of which the following is a copy.

Bankrupt record.—Petition by debtor.

To the honorable the supreme court of the Territory of Colorado for the district of Colorado:

The petition of George W. McClure, of the city of Denver, in the county of Arapahoe, and Territory of Colorado, respectfully represents that he has resided for one hundred and sixteen months next immediately preceding the filing of this petition, at Denver, within said district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all of the same in full; that he is willing to surrender all his estate and effects for the payment of his creditors, and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and the amendments thereto; that the schedules hereunto annexed, marked "A," and verified by your petitioner's oath, contain a just, full, and true statement of all his debts, and, so far as it is possible, to ascertain the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act; that the schedule hereunto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all

his estate, both real and personal, assignable under the provisions of said act. Wherefore your petitioner prays that he may be ad-
18 judged by the court to be a bankrupt within the provisions of said act, and that he may be decreed to have a certificate of discharge from all his debts provable under the same.

GEORGE W. McCLURE.

Oath.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

I, George W. McClure, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information, and belief; and I do further swear that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

GEORGE W. McCLURE.

Subscribed and sworn to before me this 9th day of May, A. D. 1870.

S. E. BROWNE,
Register in Bankruptcy.

19 SCHEDULE A.

Statement of all creditors whose debts are to be paid in full, or to whom priority is secured, according to the provisions of the 28th section of the act.

Names of creditors.	Residence and occupation.	Amount.		When and where contracted.	Nature and consideration of the debt—whether contracted as a corporation or joint contractor; and, if so, with whom.
		Dollars.	*Cents.*		
Arapahoe County	Arapahoe County, Colorado.	1,378	59	Arapahoe County, 1868.	For taxes assessed against the property of petitioner for the year 1868.
Arapahoe County	Arapahoe County, Colorado.	1,001	60	Arapahoe County, 1869.	For taxes assessed against the property of petitioner for the year 1869.
City of Denver...	Arapahoe County, Colorado.	281	00	Arapahoe County, 1869.	For taxes assessed against the property of the petitioner for the year 1869 by the city of Denver.

GEORGE W. McCLURE, *Petitioner.*

20 SCHEDULE A2.—IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT.

Creditors holding security.

Names of creditors.	Residence.	When and where contracted.	Value of securities. Dollars.	Value of securities. Cents.	Amount of debt. Dollars.	Amount of debt. Cents.	Particulars.
Thomas Gaff and James W. Gaff: Mortgage given by petitioner to Austin M. Clark, to secure the payment of said note, on lots 1, 2, 3, 4, 5, and 6, in block 98, and lots 23, 24, and 25, in block 46, in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado.	Cincinnatti, Ohio; liquor merchants.	Denver, Colorado, September 30, 1866.	56,000	00	20,000	00	This is a mortgage by petitioner to Austin M. Clark for $20,000, September 3d, 1866, with interest at 1½ per cent. per month, payable yearly, and assigned by said Clark to the said Thomas Gaff and James W. Gaff, September 28th, 1868—$4,800 of said interest paid to Clark.
Thomas Gaff and James W. Gaff: Mortgage given by petitioner to Thomas Gaff and James W. Gaff to secure the payment of said notes, on lots 1, 2, 3, 4, 5, and 6, in block 98, and lots 23, 24, and 25, in block 46, in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado.	Cincinnatti, Ohio; liquor merchants.	Denver, Colorado, February 2d, 1867.	56,000	00	18,000	00	This indebtedness is three notes given by petitioner to one George W. Lane, and delivered by the said Lane to Thomas and James W. Gaff, the said notes payable to the order of the said Thomas and James W. Gaff, each note being given for the sum of 6,000.00, and one note payable three months after date; the second note six months after date; the third note nine months after date, each of said notes to draw three per cent. per month interest from date until paid.

GEORGE W. MCCLURE, *Petitioner.*

21 SCHEDULE A3D.—IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT.

Creditors whose claims are unsecured.

Names.	Residence.	Amount. Dollars.	Amount. Cents.	When and where contracted.	
Charles & Elbert..	Denver, attorney at law.	320	00	December, 1867, Denver, Colorado.	Services performed as attorneys at law, in the years, 1866, 1867, and 1868.
Brown & Meckling.	Denver, attorneys.	1,840	00	December, 1869, Denver, Colorado.	Services rendered as attorneys at law in the years 1868, 1869, and 1870.

GEORGE W. MCCLURE, *Petitioner.*

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

On this 9th day of May, A. D. 1870, personally before me came George W. McClure, the petitioner mentioned in, and who subscribed to, the foregoing petition and schedules, marked "A," respectively, who, being by me first duly sworn, did declare the said schedules to be a statement of all his debts, &c., in accordance with the act of Congress entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867, and the supplements thereto.

S. E. BROWN,
Register in Bankruptcy.

22 SCHEDULE B1.—INVENTORY.

Schedule of all real and personal estate and effects whatever which are now in the possession enjoyment, or under the control of the petitioner, or which are held by any other person in trust for him, or to the possession or enjoyment of which he is entitled at the date of filing his petition.

Particular description of all real estate owned by petitioner or held by him, whether under contract or lease.	Incumbrances thereon, and dates thereof.	Statement of all particulars relating thereto.	Estimated va.	
			Dollars.	*Cents.*
Lots one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block 98; also lots twenty-three, (23,) twenty-four, (24,) and twenty-five, (25,) in block forty-six, (46,) in the east division of the city of Denver, county of Arapahoe and Territory of Colorado.	Austin M. Clark, September, 1866. Thomas Gaff and James W. Gaff, February 2d, 1867.	Themortgage first given Austin M. Clark, to secure $20,000 and note, assigned to Thomas Gaff and James W. Gaff, September 23d, 1868. Mortgage to Thomas Gaff and James W. Gaff, to secure three promissory notes payable three, six, and nine months from date, respectively, with the interest thereon.	56,000	00
Lots twenty-one (21) and twenty-two, (22,) in block one hundred and thirty-five, (135,) in the east division of the city of Denver, county of Arapahoe and Territory of Colorado.	.....	.....	400	
Lot one, (1,) in block thirty, in the west division of the city of Denver.	Claimed and occupied by one Joseph E. Bates.	Said property was purchased by petitioner at sheriff's sale, and a sheriff's deed given therefor.	100	
Also, lots two, (2,) three, (3,) and four, (4,) in block sixty-four, (64,) west division of the city of Denver.	Claimed and occupied by one Lewis E. Curtire.	.....	1,000	

GEORGE W. MCCLURE, *Petitioner.*

23 SCHEDULE B2.—INVENTORY.

IN THE MATTER OF
GEORGE W. MCCLURE, BANKRUPT.

PERSONAL PROPERTY.

One promissory note given by Mrs. W. F. Griswold to petitioner, payable sixty days after date, with interest at three per cent. per month, and dated October 27th, 1867 ..... 250 00

One judgment in the district court of Arapahoe County, Colorado, against John Henry, obtained in said court at the December term, A. D. 1867, upon which judgment the sheriff of said county has collected, and now holds, about seventeen hundred dollars—estimated value, seventeen hundred and forty-eight dollars and forty-nine cents..... 7,148 49

One claim against George W. Lane, now in suit in the district court of Arapahoe County, Colorado Territory..... 21,045 00

A claim against Joseph E. Bates, now in suit in the district court of Arapahoe County, Colorado Territory..... 1,000 00

One claim against L. N. Greenleaf & Co., now in suit in the probate court of Arapahoe County, Colorado Territory... 250 00

One claim against J. W. Douglas, in suit in the probate court of Arapahoe County, Colorado Territory..... 400 00

One claim against the county of Arapahoe, Colorado Territory, now in suit in the probate court of said county..... 200 00

GEORGE W. MCCLURE,
Petitioner.

24 SCHEDULE B2.—P'VENTORY.

IN THE MATTER OF }
GEORGE W. MCCLURE, BANKRUPT. }

PERSONAL PROPERTY.

D.

Household goods and furniture	
Household store	
Wearing apparrel and ornaments of the person	
Two bedsteads; beds, and bedding for the same	75 00
Three stoves; pipe and furniture for the same	40 00
Two tables, and tabel-cloths	5 00
Crockery, cutlery, and other table furniture	25 00
Two sets of chairs, a rocking-chair, and a sofa	20 00
Four carpets	40 00
One clock	6 00
One dressing-beaureau	15 00
One wash-stand	8 00
Wearing apparrel	25 00

GEORGE W. MCCLURE,
Petitioner.

SCHEDULE B3.

IN THE MATTER OF }
GEORGE W. MCCLURE, BANKRUPT. }

CHOSES IN ACTION.

Due petitioner for rent of store on lot 23, in block 46, East Denver, by L. N. Greenleaf	375 00
Due petitioner on lot 24, block 46, East Denver, by J. W. Douglas	600 00
Due petitioner for rent of court-room and offices, in building on lot twenty-three, block 46, East Denver, by the county of Arapahoe	300 00
25 Due petitioner for rent of United States court-room and offices, in building on lot twenty-three, in block 46, East Denver, by the United States	100 00

GEORGE W. MCCLURE,
Petitioner.

SCHEDULE B5TH.—INVENTORY.

IN THE MATTER OF }
GEORGE W. MCCLURE, BANKRUPT. }

A particular statement of the property claimed as exempted from the provisions of said act by the provisions of the fourteenth section thereof, giving each item of property and its valuation, and, if any portion of it is real estate, its location, description, and present use.

Property claimed to be exempted by the State laws, and under what State-law. Exemption is claimed to be exempt under the forty-eighth chapter of the Revised Statutes of Colorado Territory:

Two bedsteads; beds, and bedding for the same	75 00
Three stoves; pipe and furniture for the same	40 00
Two tables, and table-cloths	5 00

Crockery, cutlery, and other table furniture	25 00
Two sets of chairs; one rocking-chair, and a sofa	20 00
Two carpets, forty el	40 00
One clock	6 00
One dressing beaureau	15 00
One wash-stand	8 00
Wearing apparrel	25 00

GEORGE W. McCLURE,
Petitioner.

26 SCHEDULE B6.—INVENTORY.

IN THE MATTER OF }
GEORGE W. McCLURE, BANKRUPT. }

A true list of all books, papers, deeds, and writings relating to his trade, business-dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in his possession or under his custody and control, or which are in the possession or control of any person in trust for him, or for his use, benefit, or advantage; and also of all others what have been heretofore at any time in his possession, or under his control, and which are now held by the parties whose names are hereinafter set forth, with the reason for the custody of the same.

B.—Deeds.

From Judge Hall to petitioner, of lots one, (1,) (2,) two, three, (3,) four, (4,) five, (5,) and six, (6,) in block 98, in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado.

From Judge J. Downing, of lot twenty-three, (23,) in block forty-six, in the east division of the city of Denver, county and Territory aforesaid.

From George T. C. Coch, of lot twenty-four, in block forty-six, in the east division of the city of Denver, in the county and Territory aforesaid

From Amos Steck, of lot twenty-five, (25,) in block forty-six, in the east division of the city of Denver, county and Territory aforesaid.

From John Henry, lots twenty-one (21) and twenty-two, in block one hundred and thirty-five, (135,) in the east division of the city of Denver, county and Territory aforesaid.

27 From John Henry, per R. Sopris, sheriff, of lot one, in block thirty, (30,) and lots two, three, and four, in block sixty-four, all in the west division of the city of Denver; also two and one-half acres of ground in the northwest corner of section four, township four S., range sixty-eight W.

GEORGE W. McCLURE,
Petitioner.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

On this 9th day of May, A. D. 1870, personally came George W. McClure, the person mentioned, and who has subscribed to the foregoing petition and schedules marked "B," respectively, and who being by me first duly sworn, did declare the same schedules to be a statement of all his estate, both real and personal, in accordance with the act of

Congress, entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, A. D. 1867, and amendments thereto.

S. E. BROWN,
Register in Bankruptcy.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

George W. McClure, the person mentioned in, and who subscribed to, the foregoing petition and Schedules A and B, respectively, and being first duly sworn, upon oath says that, I am not liable upon any bills discounted and which ought to be paid by the acceptors, and neither am I liable upon any accommodation-paper, and for which reasons I have omitted from my schedules the two schedules marked "A4," and "A5," and further, that I have no property in reversion, remainder, or expectancy, and that, for this reason, I have omitted from my schedules,
28 aforesaid, the schedule marked "B4," and further saith not.

GEORGE W. McCLURE.

Subscribed and sworn to before me this 9th day of May, A. D. 1870.
S. E. BROWN,
Register in Bankruptcy.

(Indorsed:) 66. In re George W. McClure, in bankruptcy. Petition and schedules filed May 10th, 1870, at 10 o'clock a. m. David Crater, clerk. M. Benedict, solicitor.

TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. McCLURE, BANKRUPT. } In bankruptcy.

George W. McClure, the bankrupt aforesaid, being first duly sworn, upon oath deposes and says that, heretofore, to wit, at the time of filing his petition and schedule, under his said bankruptcy, he was advised and verily believed that it would be contrary to equity and good conscience, and not a part of his duty under the bankrupt act, to place in his said Schedule, B3, the items appearing upon the amended Schedule B3 hereunto attached, and that in consequence thereof he omitted the said items from his said schedule; wherefore he now prays that he may be allowed to amend his said Schedule B3, hereunto attached, made a part of his petition and schedules heretofore filed under his said bankruptcy; and further this deponent saith not.

GEORGE W. McCLURE,
Bankrupt.

Subscribed and sworn to before me this day of July, A. D.
29 1870.
S. E. BROWN,
Register in Bankruptcy.

AMENDED SCHEDULE B3.

Due petitioner, from C. S. Eyster, for rent of dwelling-house, to May 9th, 1870, on lots one, 2, 3, 4, 5, and 6, in block 98, east division of the city of Denver, at 50$ per month 350 00

Due petitioner, from C. J. Clark, for about 9 months' rent to May 9th, 1870, of building now occupied as news depot and U. S. post-office, situate on lot 24, of block 46, East Denver, at $125.00 per month 1,125 00

Due petitioner, from C. Duhem and Bro., for about 6 months' to May 9th, 1870, rooms on second floor of building situate on lot 24, of block 46, East Denver, at 45$ per month. 275 00

Due petitioner, from Arapahoe County, for about three months' rent, to 9th of May, A. D. 1870, of room on second floor of building on lot 24, block 46, East Denver, occupied as probate court-room, at $50 per month 150 00

GEORGE W. McCLURE,
Petitioner.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

On this 29th of July, A. D. 1870, before me personally came George W. McClure, the person mentioned in and who subscribed to the foregoing petition and schedules, marked "B," respectively, and who, being by me first duly sworn, did declare that said schedules, as amended, to be a statement of all his estate, both real and personal, in accord-
30 ance with the provisions of an act of Congress entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867, and the amendments thereto.

SAM. E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Amend' krupt schedule B3d. Filed July 29th, 1870. David Crater, clerk.

In the supreme court of Colorado Territory, for the district of Colorado.

IN THE MATTER OF GEORGE W. McCLURE.
A petition for adjudication in bankruptcy of himself. } In bankruptcy.

DISTRICT OF COLORADO, *ss:*

Whereas George W. McClure, of the county of Arapahoe and Territory of Colorado, and district aforesaid, has, on this 10th day of May, A. D. 1870, at 10 o'clock a. m., filed in the office of the clerk of said court a petition for adjudication in bankruptcy, against himself, according to the provisions of the act of Congress entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867: It is, therefore, ordered that said petition be referred to Samuel E. Brown, esq., register in bankruptcy of this court to make adjudication thereon, and take such other proceedings therein as are required by said act; and further, that the said George W.
31 McClure shall, on or before the 11th day of May, A. D. 1870, at 10 o'clock a. m., file with said register a duplicate copy of said petition and the schedules thereto annexed, and that he attend before said register on said day, and thenceforth as said register may direct, to submit to such orders as may be made by said register or by this

court relating to his said bankruptcy; and further, until otherwise ordered by the court, the said register shall act upon the matters arising in the case at his office at Denver City, at such times as he shall fix for that purpose.

Witness the honorable Moses Hallett, chief-justice of the said court, and the seal thereof, at Denver City, in said district, on the eleventh day of May, A. D. 1870.

[SEAL.]

DAVID CRATER,
Clerk Supreme Court Colorado.

(Indorsed:) Supreme court. In the matter of George W. McClure, bankrupt. Order of reference filed Dec. 6th, 1870, at 10 o'clock p. m. David Crater, clerk.

TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, by whom a petition for adjudication of bankruptcy was filed on the day of May, A. D. 1870, in said court. } In bankruptcy.

At Denver, in said Territory, on the eleventh day of May, A. D. 1870, before S. E. Brown, esq., register of said court in bankruptcy.

I, the undersigned, a register of said court in bankruptcy, upon good proof before me, S. E. Brown, taken, do find that the said George W. McClure has become a bankrupt within the true intent and meaning of the act of Congress entitled an act to establish a uniform system of
32 bankruptcy throughout the United States, approved March 2, 1867, and I do hereby declare and adjudge him a bankrupt accordingly; and I also hereby certify that I have examined the petition and schedules filed under the said bankruptcy, and find them to be correct according to said act.

S. E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Adjudication and certificate of bankruptcy. Filed December 7th, 1870, at 11 o'clock a. m. David Crater, clerk supreme court.

In the supreme court of the territory of Colorado.

IN THE MATTER OF GEORGE W. MCCLURE, by whom a petition for adjudication of bankruptcy was filed on the ninth day of May, A. D. 1870, in said court. } In bankruptcy.

TERRITORY OF COLORADO, *ss:*

To the marshall of the Territory of Colorado, greeting:

Whereas a petition for adjudication of bankruptcy and for relief, under the act of Congress entitled An act to establish a uniform system of bank-

ruptcy throughout the United States, approved March 2, 1867, was, on the ninth day of May, A. D. 1870, filed by George W. McClure, of Arapahoe County, in said Territory, upon which he hath been found and adjudged a bankrupt, there being no opposing party thereto: You are, therefore, hereby directed, as messenger, to publish, three times, in the Rocky Mountain Herald, the first publication to be made forthwith, the following notice, to wit: "This is to give notice that, on the eleventh day of May,
A. D. 1870, a warrant in bankruptcy was issued against the es-
33 tate of George W. McClure, of Denver, in the county of Arapahoe,
and Territory of Colorado, who has been adjudged a bankrupt on his own petition; that the payment of any debts and delivery of *of* any property belonging to such bankrupt to him or for his use, and the transfer of any property him, are forbidden by law; that a meeting of the creditors of the said bankrupt, to prove their debts, and to choose one or more assignees of his estate, will be held at a court of bankruptcy to be holden at the office of S. E. Browne, in Denver City, Colorado Territory, before S. E. Browne, register, on the 4th day of , A. D. 1870, at 9 o'clock a. m." And you are further directed to serve written or printed notice forthwith, either by mail or personally, on all creditors on the schedule filed with said bankrupt's petition, or whose names may be given you in addition thereto by the debtor, at least ten days before the appointed meeting of said court, in the following form, to wit:

To , of , in the county of , and State of , creditors of , bankrupt:

You are hereby notified that a warrant in bankruptcy has been issued out of the supreme court for the Territory of Colorado, against *against* the estate of , adjudged a bankrupt on his own petition; that the payment of any debts, and the delivery of any property belonging to said bankrupt to him or for his use, and the transfer of any property by him, are forbidden by law; that a meeting of the *of the* creditors of said bankrupt, to wit:

Arapahoe County, Denver, Colo	2,380 19
City of Denver	381 00
Thomas Gaff and James W. Gaff, Cincinnati, Ohio, with security	38,000 00
Charles and Elbert, Colorado Territory	320 00
Browne & Meckling, Colorado Territory	1,840 00

to prove the debts, and choose one or more assignees of his estate,
will be held at a court of bankruptcy, to be holden on the 4th
34 day of June, A. D. 1870, at 9 o'clock a. m., in Denver City, before
S. E. Brown, esq., register. And have you then and there this warrant, with your doings thereon.

Witness S. E. Browne, register of the said court, and the seal of said court at Denver, in said Territory, on the 11th day of May, A. D. 1870.

[SEAL OF THE COURT.] S. E. BROWNE,
Register in Bankruptcy.

Attest:

M. L. HORR, *Clerk.*

Return of the messenger.

COLORADO TERRITORY, *ss.:*

At Denver, C. T., on the 4th day of June, 1870, by virtue of the

within warrant, I have caused the notice therein ordered to be published by advertisement three times in the newspaper within mentioned, the *the* first publication of which was on the 13th day of May, A. D. 1870, in the Rocky Mountain Herald, and I also, on the 13th day of May, A. D. 1870, sent by mail, or served personally upon the creditors and others named in said warrant, a copy of the notice, thereby required to be sent to or served on them, and all of the said notices were according to the direction set forth in said warrant.

1. For service of warrant	2 00
2. For necessary travel 10 miles, at 5 cents per mile each way	50
3. For each written notice to creditors named in the schedule, 50 cents each	3 00
4. For actual and necessary expense in publication of notice	7 00
Attendance	5 00
	17 50

M. A. SHAFFENBURG,
U. S. Marshall as Messenger, Territory of Colorado,
By W. W. DENNISTON, *Deputy.*

TERRITORY OF COLORADO, *ss:*

JUNE *4th, A. D.* 1870.

Then personally appeared the said W. W. Denniston and made oath that the expenses returned by him, in addition to his fees, were actually and necessarily incurred and paid by him, and that the same are just and reasonable. Before me,

S. E. BROWN, *Register.*

(Indorsed:) In the matter of George W. McClure, bankrupt. Warrant filed December 6th, A. D. 1870, at 10 o'clock a. m. D. W. Crater, clerk. Filed June 4th, 1870. S. E. Brown, register.

Notice in bankruptcy.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

This is to give notice, that on the eleventh day of May, A. D. 1870, a warrant in bankruptcy was issued against the estate of George W. McClure, of the county of Arapahoe, and Territory of Colorado, aforesaid, who has been adjudged a bankrupt on his own petition; that payment of any debts, and the delivery of any property belonging to such bankrupt, to him, or for his use, and the transfer of any property by him are forbidden by law. That a meeting of creditors of said bankrupt, to prove their debts and to choose one or more assignees of his estate, will be held at a court of bankruptcy to be holden at the city of Denver, in the Territory of Colorado, at the office of Samuel E. Browne, register, on the 4th day of June, A. D. 1870, at 9 o'clock a. m.

M. A. SHAFFENBURG,
U. S. Marshal, as Messenger, Colorado Territory.

36 *Certificate of publication.*

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, O. J. Goldrick, of said county of Arapahoe, do hereby certify that

I am the publisher and proprietor of the Rocky Mountain Herald, a newspaper printed and published in Denver, in said county and Territory, and I further certify that the notice, of which the annexed is a true copy, has been published in said newspaper for three successive weeks, and three times, and that the first publication of said notice was in said paper bearing date the 13th day of May, A. D. 1870, and the last publication of said notice was in said paper bearing date the 27th day of May, A. D. 1870.

In witness whereof I have hereunto set my hand this 1st day October, A. D. 1870.

O. J. GOLDRICK.

[5-cent revenue stamp.]

(Indorsed:) In re George W. McClure, bankrupt. Certificate of publication. Marshall's notice. Filed October 1st, 1870. David W. Crater, clerk supreme court.

TERRITORY OF COLORADO, *ss:*

In the supreme court.

IN THE MATTER OF GEORGE W. McCLURE, BANKRUPT, } In bankruptcy.

DISTRICT OF COLORADO:

I do hereby certify that I have carefully examined the schedules, petitions, and other papers filed in said court, together with the
37 warrant and return thereof by the marshal, as messenger of said court, and find the same are regular, and in pursuance of the bankrupt act aforesaid. I further certify, that no opposition has been made before me to the discharge of said bankrupt, and that he is, in my opinion, entitled to his final discharge as prayed for in his said petition.

Attest:

SAM. E. BROWNE,
Register in Bankruptcy.

SEPTEMBER 3d, A. D. 1870.

(Indorsed:) In the matter of George W. McClure, bankrupt. Certificate of compliance with the bankrupt act. Filed at 1 p. m., December 6th, 1870.

In the supreme court of the district of Colorado Territory.

IN THE MATTER OF GEORGE W. McCLURE, BANKRUPT. } In bankruptcy.

DISTRICT OF COLORADO:

To John Mechling, of Denver City, county of Arapahoe, and Territory of Colorado.

I do hereby certify that you were duly appointed assignee of the estate and effects of the above-named bankrupt, at the first meeting of creditors, on the 4th day of June, A. D. 1870. I do further certify that no creditors were present or duly *duly* represented at said meeting, and further, that you are hereby required forthwith to notify me, as register

in bankruptcy of said district, of your acceptance or refusal of said trust.

S. E. BROWNE,
Register in Bankruptcy.

To whom it may concern:

38 Be it known, that I hereby signify my acceptance of the trust of assignee of the estate of the above-named bankrupt, this 4th day of May, A. D. 1870.

JOHN MECHLING,
Assignee.

(Indorsed:) In the matter of George W. McClure, bankrupt. Notice of appointment of assignee, and his acceptance. Filed at one o'clock, p. m., Dec. 6th, 1870. David Crater, clerk.

TERRITORY OF COLORADO:

In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

At Denver, in said Territory, on the 14th day of June, A. D. 1870, before S. E. Browne, register.

MEMORANDUM.—I this day attended at my office, and I hereby certify that John Meckling was appointed assignee of the estate and effects of George W. McClure, the bankrupt aforesaid, as appears by the papers herewith transmitted.

SAM. E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Certificate of the appointment of John Meckling, assignee. Filed December 7th, 1870, at 11 o'clock a. m., and recorded. David W. Crater, clerk.

Notice.

TERRITORY OF COLORADO, *ss:*

39 In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

To whom it may concern:

The undersigned hereby gives notice of his appointment a' assignee of George W. McClure, of Denver, in the county of Arapahoe, in said Territory of Colorado, who has been adjudged a bankrupt upon his own petition, by said court. Dated at Denver, this 30th day of July, A. D. 1870.

JOHN MECKLING,
Assignee.

Certificate of publication.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, O. J. Goldrick, of said county of Arapahoe, do hereby certify that I am the publisher and proprietor of the Rocky Mountain Herald, a weekly newspaper printed and published in Denver, in said county and Territory, and I further certify that the notice, of which the annexed is a true copy, has been published in said newspaper for three successive weeks, and three times, and that the first publication of said notice was in said paper bearing date the 30th day of July, A. D. 1870, and the last publication of said notice was in said paper bearing date the 13th day of August, A. D. 1870.

In witness whereof I have hereunto set my hand this 28th day of September, A. D. 1870.

O. J. GOLDRICK.

[5-cent U. S. revenue-stamp.]

(Indorsed:) In re George W. McClure, bankrupt. Certificate of publication of assignee's notice. Filed October 1st, 1870. David W. Crater, clerk supreme court.

40 In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

DISTRICT OF COLORADO:

Know all men by these presents that John Meckling, of Denver, in the county of Arapahoe, Colorado Territory, has been duly appointed assignee of said matter: Now, therefore, I, S. E. Browne, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th *fourteenth* section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said John Meckling, assignee as aforesaid, all the estate, real and personal, of the said George W. McClure, bankrupt aforesaid, including all the property of whatever kind of which he is possessed, or in which he was interested, or entitled to have, on the 9th day of May, A. D. 1870, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of the fourteenth section of said act; to have and to hold all the foregoing to the said John Meckling and his heirs forever, in trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness whereof I, as such register, have set my hand and caused the seal of said court to be affixed the 9th day of June, A. D. 1870.

[SEAL OF COURT.] SAMUEL E. BROWNE,
Register in Bankruptcy.

(Indorsed:) George W. McClure, bankrupt. Assignment by register to assignee. Filed July 26th, 1870, at 10 o'clock a. m. David W. Crater, clerk.

41 UNITED STATES OF AMERICA,
District of Colorado Territory, ss:

In the supreme court of Colorado.

To the honorable supreme court of Colorado Territory:

Your petitioner, John Meckling, assignee of the estate and effects of said George W. McClure, bankrupt, respectfully represents unto your honors that before the commencement of proceedings in bankruptcy in the above-entitled matter, to wit, on the 3rd day of September, A. D. 1866, the said bankrupt made his certain promissory note for the sum of twenty thousand dollars, ($20,000,) payable to one Austin M. Clark, payable on the 2d day of September, A. D. 1867, with interest from date, interest payable at the rate of one and one-half per cent. per month, and for the better securing the payment of the said twenty thousand dollars mentioned in said promissory note, the said George W. McClure, bankrupt, made, executed, and delivered to the said Austin M. Clark, his mortgage-deed for lots 23, 24, & 25, in block forty-six (46) East Denver. Also lots 1, 2, 3, 4, 5, and 6 in block ninety-eight (98) East Denver, Arapahoe County and Territory aforesaid, and your petitioner further represents unto your honors that afterwards, to wit, on the 2d day of February, A. D. 1867, the said George W. McClure, bankrupt, made three other promissory notes for the sum of six thousand dollars each, payable to Thomas Gaff and James W. Gaff; the first of said notes became due and payable in three months from date, the second in six months from date, and the third in nine months from date, *date*, with interest from date until paid, at the rate of three per cent. per month, and for the better securing the amount of money mentioned in said promissory notes, the said George W. McClure made, executed, and delivered to the said Thomas Gaff and James W. Gaff his mortgage-deed, bearing same date, of lots 23, 24, and 25 in block forty-six, (46,) and lots 1, 1, 3, 4, 5, and six in block ninety-eight (98) East Denver, county of Arapahoe and Territory of Colorado.

42 And afterwards, to wit, on the 28th day of September, A. D. 1868, the said Austin M. Clark assigned the first of the aforementioned notes and mortgage for a valuable consideration to the said Thomas Gaff and James W. Gaff; and your petitioner would further represent unto your honors that afterwards, to wit, on the 11th day of December, A. D. 1868, the said Thomas Gaff and James W. Gaff, by Messrs. Charles & Elbert, their solicitors, filed in the district court of the first judicial district of Colorado Territory, in and for Arapahoe County, their bill in chancery, for the purpose of foreclosing said mortgages, and that during the pendancy of this suit and before a final decree had been rendered, or an order of sale made, to wit, on the 9th day of May, A. D. 1870, the said George W. McClure filed his petitions and schedules, verified by his oath, in the said supreme court of Colorado Territory, praying that he might be adjudged a bankrupt on his own petition; and afterwards, to wit, on the 4th day of June, A. D. 1870, the day appointed by the register in bankruptcy to choose an assignee, the creditors failing to appear, said register appointed your assignee of the estate and effects of said bankrupt, subject to the approval of said supreme court. And afterwards, to wit, on the 30th day of June, A. D. 1870, the said bankrupt caused to be filed in the said district court of the first judicial district of Colorado Territory, for Arapahoe County, and in the cause then pending to foreclose said mortgages, the certificate of said register in bankruptcy, that the said George

W. McClure had been duly adjudged a bankrupt according to an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that upon the filing of said certificate *petition* the bankruptcy of said George W. McClure was suggested upon the record of said court; and your petitioner further represents that afterwards, to wit, on the first day of July, A. D. 1870, Christian S. Eyster, judge of said court, signed a decree and order of sale in said cause, in which a
43 special master in chancery was appointed to make such sale, unless the said George W. McClure pay, or cause to be paid, the sum of money due upon said promissory notes within thirty days.

And your petitioner further represents unto your honors that, at the time of filing said bill in chancery in said district court, the said McClure was in the quiet and peac'ible possession of said mortgage' premises, in person and by tenant, and remained in such possession till about the first day of January, A. D. 1870, when said Gaffs, by their agent or attorneys, notified that they held a mortgage on the respective parts of real estate occupied by them, and insisted upon their paying the rent to them as mortgagees; a number of said tenants agreed to attorn to said mortgages, upon condition that they, the said mortgage's, give them, the said tenants, indemnifying bonds. Said bonds were given by Messrs. Charles & Elbert, as your petitioner is informed; and from that time until the present they have collected rent from as many of said tenants as were willing to pay, thereby constituting the said Charles & Elbert ex-parte private receivers de son tort, without the sanction of any court of equity. The amount of rent accruing on said mortgaged premises from January until August first, as nearly as your petitioner can ascertain, is five thousand two hundred dollars.

This amount of money, or any part thereof, has not been credited on said notes or decree in the payment of interest accruing, nor *nor* has it been accounted for in any other way; and your petitioner would further represent unto your honors that the said Thomas Gaff and James W. Gaff have neither in person nor by attorney proved their claim, or any part thereof, against the estate of the said McClure, bankrupt, in said supreme court.

And your petitioner further represents unto your honors that he has demanded payment of rent from said tenants to him as assignee of the estate of said George W. McClure, bankrupt, and *and* they refused to pay either what was due at the time of adjudication or the amount accruing since that time.

44 And your petitioner further represents unto your honors that there is danger of part of said rent being lost if not collected promptly as it becomes due; also that it *it* would be for the interest of the estate of said bankrupt to have all of said rent deposited in some secure place, subject to the order of the supreme court of Colorado Territory.

Therefore your petitioner prays that an order issue out of and under the seal of this honorable court, directed to the marshal*l* of said district, to serve upon each of said tenants, to wit: L. N. Greenleaf, J. W. Douglass, Arapahoe County, United States of America, U. S. post-office, Christian S. Eyster, C. Duhem and brother, E. C. Holmes, and all others who may be found in possession of said mortgaged premises, or any part thereof, commanding them, and each of them, at an early day, to pay into the designated depository of this court all moneys which may be due to the estate of said George W. McClure, bankrupt, for rent as aforesaid, there to await the further order and direction of this honor-

able court; the amount due from each of said tenants to be ascertained by settlement with assignee of said bankrupt.

JOHN MECHLING, *Assignee.*

(Indorsed:) George W. McClure, bankrupt. Petition of assignee to collect rent. Filed August 2d, 1870. D. W. Crater, clerk.

In the supreme court of Colorado Territory. In bankruptcy.

DISTRICT OF COLORADO:

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

45 To the creditors of the above-named bankrupt:

Take notice that said bankrupt has *has* filed his petition for a discharge from all his debts in said court, and that said register has appointed the 6th day of December, A. D. 1870, at 10 o'clock a. m. of said day, before the said court, at the court-house in the city of Denver, in said Territory, as the time and place when and where you may attend, and show cause, if any you have, why the prayer of the said petitioner should not be granted. You are hereby further notified that the second and third meetings of the creditors of said bankrupt will be held before said register at his office in the city of Denver, in said Territory, on the 3d day of December, A. D. 1870, at 9 o'clock a. m.

Dated Denver, November 11th, 1870.

[SEAL.] DAVID W. CRATER, *Clerk.*

(Indorsed:) In the matter of George W. McClure, bankrupt. Pub. notice. Filed at 9 a. m., November 11th, 1870. D. W. Crater, clerk.

In the supreme court of the Territory of Colorado.

DISTRICT OF COLORADO:

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

At Denver, in said district, on the eleventh day of November, A. D. 1870.

SIR: Take notice that a petition has been filed in said court by George W. McClure, of Denver, in said district, duly declared a bankrupt under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, for a discharge and certificate thereof from all his debts and
46 other claims provable under said act, and that the 6th day of December next, at 10 o'clock a. m., is assigned for the hearing of the same, when and where you may attend, and show cause, if any you have, why the prayer of the said petitioner should not be granted.

DAVID W. CRATER,
Clerk of the Supreme Court.

I hereby certify that a notice, of which the above is a true copy, was duly mailed to Messrs. Browne and Meckling, directed to them at Denver, Colorado, and that the proper postage-stamps, on the 12th day of

November, A. D. 1870. Witness my hand and the seal of the said supreme court at Denver, November 12th, A. D. 1870.

[SEAL.] DAVID W. CRATER, *Clerk.*

(Indorsed:) In the matter of George W. McClure, bankrupt. Clerk's certificate of notice made to creditors. Filed November 12th, 1870, at 10 o'clock a. m. David W. Crater, clerk.

Notice in bankruptcy.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

This is to give notice, that on the eleventh day of May, A. D. 1870, a warrant in bankruptcy was issued against the estate of George W. McClure, of the county of Arapahoe and Territory of Colorado aforesaid, who has been adjudged a bankrupt on his own petition; that payment of any debts and the transfer of any property belonging to such bankrupt to him or for his use, and the transfer of any property by him, are forbidden by law; that a meeting of *that a meeting of* creditors of said bankrupt, to prove their debts and to choose one or more assignees of his estate, will be held at a court of bankruptcy to be holden
47 at the city of Denver, in the Territory of Colorado, at the office of Samuel E. Browne, register, on the 4th day of May, A. D. 1870, at 9 o'clock a. m.

M. A. SHAFFENBURG,
As Messenger for Colorado Territory.

Certificate of publication.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, O. J. Goldrick, of said county of Arapahoe, do certify that I am the publisher and proprietor of the weekly Rocky Mountain Herald, a weekly newspaper printed and published in Denver, in said county and Territory, and I further certify that the notice of which the annexed is a true copy has been published in said newspaper for three successive weeks and three times, and that the first publication of said notice was in said paper bearing date the seventh day of May, A. D. 1870, and the last publication of said notice was in said paper bearing date the thirtieth day of May, A. D. 1870.

In witness whereof I have hereunto set my hand this fourth day of June, A. D. 1870.

O. J. GOLDRICK.

[5-cent. revenue-stamp.]

(Indorsed:) In the matter of George W. McClure, bankrupt. Proof of publication notice first meeting of creditors. Filed June 4th, at 9 o'clock a. m., 1870. L. E. Browne, register. Filed at 1 p. m., December 6th, 1870. David Crater, clerk.

In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

48 At Denver, in said district, on the 4th day of June, A. D. 1870, before me, S. E. Browne, register.

MEMORANDUM.—This being the day appointed by me as register for

the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the Rocky Mountain Herald and by special notice served personally or through the mail, I, the undersigned register in bankruptcy of said court, sat at the time and place above named, pursuant to said notice, to take proof of debts and for the choice of assignee under said bankruptcy, and I do hereby certify that no creditors were present, and that the creditors having failed to make choice of an assignee of said bankrupt, and there being no opposing interest, I appointed John Meckling of *of* Denver City, Colorado, as assignee of the same.

S. E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Mem. first meeting. Filed at 10 o'clock, December 6th, 1870. David W. Crater, clerk.

TERRITORY OF COLORADO, *ss:*

In the supreme court. In bankruptcy.

IN THE MATTER OF GEORGE W. MCCLURE, BANKKUPT. } In bankruptcy.

DISTRICT OF COLORADO:

I do hereby certify that I attended at my office in the city of Denver, on the 3d day of December, A. D. 1870, at 9 o'clock a. m., the time and place fixed for the second and third meeting of the creditors of the said bankrupt; that no creditor appeared either in person or by representation.

49

SAM. E. BROWNE,
Register in Bankruptcy.

DEC. 3D, 1870.

(Indorsed:) In the matter of George W. McClure, bankrupt. Certificate of 2d, 3d meetings. Filed 1 p. m., December 6th, 1870. D. W. Crater, clerk.

TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

At Denver, in said Territory, on the 11th day of November, A. D. 1870, before me, S. E. Browne, register.

MEMORANDUM.—The following is a list of all the creditors who have up to this day proved their debts against the estate of George W. McClure, of Denver, in the county of Arapahoe, in the Territory of Colorado, the bankrupt aforesaid.

Browne & Mechling, Denver, Colorado. $1,840.00

SAM'L E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Certified list of debts proved. Filed November 11th, 1870. David W. Crater, clerk supreme court.

In the supreme court of Colorado Territory. In bankruptcy.

DISTRICT OF COLORADO:

IN THE MATTER OF GEORGE W. McCLURE, BANKRUPT.

Before S. E. Browne, register in bankruptcy.

50 To the creditors of the above-named bankrupt:

Take notice that said bankrupt has filed his petition for a discharge from all his debts in said court, and that said register has appointed the 6th day of December, A. D. 1870, at 10 o'clock a. m., of that day, before said court, at the court-house in the city of Denver, in said Territory, as *as* the time and place when and where *and where* you may attend and show cause, if any you have, why the prayer of said petitioner should not be granted. You are further hereby notified that the second and third meetings of the creditors of said bankrupt will be held before said register, at his office in the city of Denver, in said Territory, the third (3d) day of December, A. D. 1870, at 9 o'clock a. m. Dated at Denver, November 11th, 1870.

[SEAL.] DAVID W. CRATER, *Clerk.*

Certificate of publication.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I O. J. Goldrick, of said county of Arapahoe, do hereby certify that I am the publisher and proprietor of the Rocky Mountain Herald, a weekly newspaper printed and published in Denver, in said county and Territory, and I do further certify that the notice of which the annexed is a true copy has been published in said newspaper for three successive weeks and three times, and that the first publication of said notice was in said paper bearing date the 12th day of November, A. D. 1870, and the last publication of said notice was in said paper bearing date the 26th day of November, A. D. 1870. In witness whereof I have hereto set my hand this 5th day of December, A. D. 1870.

O. J. GOLDRICK.

[5-cent. revenue-stamp.]

(Indorsed:) In the matter of George W. McClure. Certifi-
51 cate of publication of notice and order to show cause. Filed December 7th, 1870. D. W. Crater, clerk.

In the supreme court of the Territory of Colorado.

IN THE MATTER OF GEORGE W. McCLURE, BANKRUPT. } In bankruptcy.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

I, George W. McClure, of the city of Denver, in the county of Arapahoe and Territory of Colorado, upon my solemn oath, freely declare that I was upon the 9th day of May, A. D. 1870, upon my own petition, duly adjudged a bankrupt within the provisions of the act of Congress en-

titled an act to establish a *a* uniform system of bankruptcy throughout the United States, approved March 2, 1867, and amendments thereto, and that I have not done, or suffered or procured to be done, or been privy to any act, matter, or thing specified in said act *act*, or the amendments thereto, as the ground for withholding my final discharge therein, or invalidating the same if granted: So help me God.

GEORGE W. McCLURE,
Bankrupt.

Subscribed and sworn to before me at Denver, this 10th day of November, A. D. 1870.

SAMUEL E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Final oath. Filed at 9 o'clock a. m. November 11th, 1870. D. W. Crater, clerk.

52 In the supreme court of the Territory of Colorado.

IN THE MATTER OF GEORGE W. McCLURE, BANKRUPT. } In bankruptcy.

TERRITORY OF COLORADO, *ss:*

To the honorable the supreme court of the Territory of Colorado:

George W. McClure, of the city of Denver, in the county of Arapahoe and Territory of Colorado, and within the jurisdiction of the supreme court, respectfully represents that, on the 9th day of May last past, he was duly declared a bankrupt under the act of Congress entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867; that he has duly surrendered all his property and rights of property, and fully complied with and obeyed all the orders and directions of this court touching his bankruptcy, and is ready to submit himself to any other and further examinations, orders, and directions which the court may require. Wherefore he prays that he may be decreed by the court to have a full discharge from all his debts, proveable under said bankruptcy act, and a certificate thereof granted according to the act of Congress aforesaid.

Dated this 10th day of October, A. D. 1870.

GEORGE W. McCLURE,
Bankrupt.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

I, George W. McClure, the petitioner above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed *my* me, are true so far as the same are stated of my own knowledge, and that those matters which are stated therein on information and belief are true according to the best of my knowledge, information, and belief.

GEORGE W. McCLURE,
Petitioner.

53 Subscribed and sworn to before me this 10th day of November, A. D. 1870.

SAM. E. BROWNE,
Register in Bankruptcy.

DISTRICT OF COLORADO:

On this 10th day of November, A. D. 1870, on reading the foregoing petition, it is ordered by the court that a hearing be had on the same on the 8th day of December, A. D. 1870, before said court, at Denver City, in said district, at 10 o'clock a. m., and that notice thereof be published in the Rocky Mountain Herald for three weeks, and three times prior to said time; and that all creditors who have proved their debts and other persons in interest may appear at said time and place, and show cause, if any they have, why the prayer of said petitioner should not be granted. There will also be notice given of the second and third meetings of creditors of said bankrupt, before S. E. Browne, register in bankruptcy, at his office in said city, at 9 o'clock a. m., on the *on the* 3d day of December, A. D. 1870. And it is further ordered by the court that all such creditors whose places of residence are known shall be entitled to notice of the petition and orders, either personally or by letter addressed to them at their known usual place of residence, attested by the clerk of the court, and sent by mail, or served at their usual place of abode by the marshal or his deputy, of which due return shall be given.

SAM. E. BROWNE,
Register in Bankruptcy.

(Indorsed:) In the matter of George W. McClure, bankrupt. Petition for final discharge. Filed at 9 o'clock a. m., Nov. 11th, 1870. D. W. Crater, clerk.

Notice.

TERRITORY OF COLORADO, *ss:*

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

54 To whom it may concern:

The undersigned hereby gives notice of his appointment as assignee of George W. McClure, of Denver, in the county of Arapahoe, in said Territory of Colorado, who has been adjudged a bankrupt upon his own petition, by said court.

Dated at Denver this 30th day of July, A. D. 1870.

JOHN MECKLING,
Assignee.

DENVER, COLORADO, *June 6th*, 1870.

Mr. G. W. McClure to O. J. Goldrick, Dr.

May 12. To bankrupt adv't as per Shaffenburg:
Blanks..... 7 00
Rec'd paymen'.

O. J. GOLDRICK.

(Indorsed:) In R. Geo. McClure, bankrupt. O. J. Goldrick's receipt for advertising. Filed 7th , 1870. D. W. Crater, clerk.

DENVER, COLORADO, 1870.

McClure, per Meckling, to Herald, Dr.

To bankrupt adv't, 3 weeks..... $7 00
Rec'd payment as per certificate.

O. J. GOLDRICK.

[5-cent. U. S. r. stamp.]

(Indorsed:) McClure per Meckling. O. J. Goldrick's receipt for pay for advertising assignee's notice. Filed Dec. 7th, 1870. D. W. Crater, clerk.

DENVER, COLORADO, *Dec. 5th*, 1870.

George W. McClure to Herald, Dr.

To advertising bankrupt, to Nov. 26, 3 weeks..... 7 00
Rec'd payment.

O. J. GOLDRICK.

(Indorsed:) In re George W. McClure. Publisher's receipt for
55 publishing notice to show cause. Filed Dec. 7th, 1870. D. W. Crater, clerk.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

This is to certify that the said bankrupt has this day paid me all fees due, as register in said matter.

S. E. BROWNE,
Register in Bankruptcy, District of Colorado.

Dec. 27th, 1870.

(Indorsed:) In the matter of George W. McClure, bankrupt. Receipt for fees of register. Filed Dec. 3d at 10 o'clock a. m. A. D., 1870. D. W. Crater, clerk.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, David W. Crater, clerk of the supreme court of Colorado Territory, do hereby certify that I have compared the above and foregoing copies of papers filed in the office of the clerk of the supreme court, in the above-entitled cause in bankruptcy, with the original papers now remaining on file in said cause, and that the same is a true and perfect transcript thereof.

In testimony whereof I have hereunto set my hand and the seal of said supreme court at Denver, this twenty-fourth day of July, A. D. 1871.

[SEAL.]

D. W. CRATER,
Clerk Supreme Court.

(Indorsed:) In the matter of George W. McClure, bankrupt.
56 Transcript of papers filed in supreme court. Gaffs vs. Eyster, district court.

In the supreme court of the Territory of Colorado, district of Colorado.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

Whereas George W. McClure has been duly adjudicated a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf: It is therefore ordered by the court that said George W. McClure be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the tenth day of May, in the year eighteen hundred and seventy, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under our hands and the seal of the court at Denver, in the said district, this twenty-eighth day of December, A. D. 1870.

[SEAL.]

C. S. EYSTER,
Associate Justice.
JAMES B. BELFORD,
Associate Justice.

In the supreme court of Colorado Territory.

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

DISTRICT OF COLORADO TERRITORY, *ss:*

57 Know all men by these presents, that John Meckling, of Denver, in the county of Arapahoe, Colorado Territory, has been duly appointed assignee of said matter. Now, therefore, I, S. E. Browne, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of the act of Congress entitled an act to establish a uniform system of bankruptcy throughout the *the* United States, approved March 2, 1867, do hereby convey and assign to the said John Meckling, assignee as aforesaid, all the estate, real and personal, of the said George W. McClure, bankrupt as aforesaid, including all the property of whatever kind of which he is possessed or in which he was interested or entitled to have on the 9th day of May, A. D. 1870, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of the fourteenth section of said act: to have and to hold all the foregoing premises to the said John Meckling and his heirs forever; in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, as such register, have hereunto set my hand and caused the seal of said court to be affixed this 9th day of June, A. D. 1870.

[SEAL.]

SAMUEL E. BROWNE,
Register in Bankruptcy.

SUPREME COURT CLERK'S OFFICE,
Denver, August 22d, 1870.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, David W. Crater, clerk of the supreme court of Colorado Territory,

do hereby certify that I have compared the foregoing copy of assignment with the original, now on file in my office, and that the same is a correct transcript therefrom and of the whole of the original assignment as appears the day therein specified.

In testimony whereof I have hereunto subscribed my name and
58 affixed the seal of the said supreme court, at Denver, the 22d day of August, A. D. 1870.

DAVID W. CRATER,
Clerk Supreme Court.

(Indorsed:) George W. McClure, bankrupt. Assignment by register to assignee. In supreme court. Filed July 26th, A. D. 1870, at 10 o'clock a. m. David W. Crater, clerk. Recorded in book 28, page 281, in the recorder's office, Arapahoe County, August 28th, A. D. 1870, at 5 and one-half o'clock p. m.

Defendant then, further to maintain the issues in said cause on his part, offered to read in evidence the bill in chancery filed in the district court of Arapahoe County in the case of Thomas Gaff and James W. Gaff against George W. McClure, filed in said district court, on the chancery side of said court, on the 11th day of December, A. D. 1868, with the exhibits to said amended bill, and also the writ issued thereon out of the said court, and the return thereon, and also the master's report of the proofs taken in the said cause and the exhibits and papers thereto attached, and also the decree of foreclosure entered by the court therein on the first day of July, A. D. 1870.

To the offering and reading in evidence of which papers as evidence in the cause, the plaintiff then and there objected and made a general objection thereto; which objection was then and there overruled by the court, and the aforementioned bill, writ, master's report, and decree, with their several and respective exhibits, were then and there allowed by the court to be read; to which ruling of the court the plaintiffs, by their counsel, then and there excepted, and an exception was then and
59 there allowed to them by the court.

And all of the said papers were then read in evidence in the cause, a copy of which is hereto annexed.

In the district court of the first judicial district of the Territory of Colorado, within and for the county of Arapahoe. To the January term thereof, A. D. 1869.

To the honorable Christian S. Eyster, judge of said court, in chancery sitting:

Humbly complaining, showeth unto your honor, your orators, Thomas Gaff and James W. Gaff, residents of the city of Cincinnati, in the State of Ohio, that George W. McClure, a resident of the city of Denver, in the county of Arapahoe, and Territory of Colorado, on the third day of September, in the year of our Lord one thousand eight hundred and sixty-six, being indebted to one Austin M. Clark, of the city of Leavenworth, and State of Kansas, in the sum of twenty thousand dollars, did make, execute, and deliver to the said Austin M. Clark, by and under the name and style of George W. McClure, his certain promissory note, bearing date the day and year last aforesaid, for the sum of twenty thousand dollars, payable to the order of the said Austin M. Clark

twelve months after the date thereof, with interest at the rate of one and one-half per cent. per month from date until paid, interest payable yearly, as by the said promissory note, ready to be produced as this honorable court shall direct, will more fully appear, a copy of which said note is hereto attached, marked Exhibit A, and made a part of this bill of complaint.

And your petitioner further shows unto your honor that the said George W. McClure, on the day and year last aforesaid, being the owner of certain real estate or lots of land situate in the said city of Denver, known and described as follows, to wit: lots number twenty-
60 three, twenty-four, (24,) and twenty-five, (25,) in block number forty-six, and lots numbers one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98,) in the east division of said city of Denver, in the county of Arapahoe, and Territory of Colorado, for the better securing the said sum of money in the said promissory note mentioned, did, by the name and style of George W. McClure, make and execute, and on the fifteenth day of September, in the year last aforesaid, duly acknowledge and deliver to the said Austin M. Clark, his mortgage-deed of conveyance for the above-described lots and premises, in fee-simple, subject, however, to a condition of defeasance on the payment of the said sum of twenty thousand dollars and interest in the manner particularly specified in the said promissory note, as in and by the said mortgage, ready to be produced in court as this honorable court shall direct, will more fully appear, a copy of which mortgage-deed is hereunto attached, marked Exhibit E, and made a part of this your orators' bill of complaint, which said mortgage-deed was duly filed for record in the office of the recorder in and for said county of Arapahoe, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and sixty-six, and duly recorded in records of said county, in book numbered eleven, (11,) on page five hundred and twenty-one, (521,) reference thereto being hereby made for greater certainty.

And your orators further show unto your honor that one Emma McClure, wife of the said George W. McClure, for some reason unknown to your orators, united with the said George W. McClure in the execution of said mortgage, but that the legal estate to *to* said mortgaged premises was at the date of said mortgage in said George W. McClure, and that said Emma McClure at the sale thereof had no right or equity in or to said mortgaged premises appearing of record, nor has she since acquired any right or equity in or to said premises which appears
61 of record, or of which your orator' have any notice.

And your orators further show unto your honor that afterwards, to wit, on the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, the said Austin M. Clark sold, assigned, transferred, and delivered to your orators the said note and mortgage for a valuable consideration, then and there paid to the said Clark by your orators.

Your orators further show unto your honor that neither the said sum of money mentioned in the said promissory note, nor the interest thereon, nor any part thereof, were paid by the said George W. McClure, nor by any one for him, at the time stipulated in said promissory note and mortgage-deed, and that the said promissory note is now long past due and remains wholly unpaid.

Your orator' further show unto your honors that afterwards, to wit, on the second day of February, in the year of our Lord one thousand eight hundred and sixty-seven, the said George W. McClure, being indebted to your orators in the sum of eighteen thousand dollars, made, executed,

and delivered to your orators, by and under the name and style of George W. McClure, three promissory notes, each of that date, and each for the sum of six thousand dollars, payable respectively in three, six, and nine months from the date thereof, with interest from date at the rate of three per cent. per month until paid to your orators or their order, as by the said promissory notes, ready to be produced in evidence as this honorable court shall hereafter direct, will more fully appear, copies of which said notes are hereto attached, marked respectively Exhibits A, B, and C, and are hereby made a part of this your orators' bill of complaint.

Your orators further show unto your honor that the said George W. McClure, on the day and year last aforesaid, being the owner of the said lots or parcels of land situated in the said city of Denver, in the county of Arapahoe, and Territory of Colorado, heretofore set forth and
62 described, subject, however, to the said mortgage heretofore set forth and described for the better securing of the said sum of money in the said promissory notes mentioned, by and under the name and style of George W. McClure, made, executed, acknowledged, and delivered to your orators his mortgage-deed of conveyance for the lots and premises heretofore set forth and described, subject, however, to a condition of defeasance on the payment of the said sum of eighteen thousand dollars therein named, in manner particularly specified in the said three promissory notes of six thousand dollars each, as aforesaid, with interest thereon, according to the tenor and effect of said notes as in and by said mortgage-deed, ready to be produced in evidence by your orators as this honorable court shall hereafter direct, will more fully appear, a copy of which said mortgage-deed is hereunto annexed, marked Exhibit D, and made a part of this your orators' bill of complaint, and which said mortgage-deed was duly filed for record in the office of the recorder for said county of Arapahoe, on the said second day of February, in the year of our Lord one thousand eight hundred and sixty-seven, and duly recorded in book number thirteen, (13,) on page one hundred and fifty, of said records of said county, reference thereto being hereby made for greater certainty.

Your orator' further shows unto your honor that neither the said sums of money mentioned in the said notes, nor the interest thereon, nor any part thereof, were paid by the said George W. McClure, nor by any one for him, at the time stipulated in said promissory notes and mortgage-deed, and that the said promissory notes, and each and every one of them, are now long past due, and remain wholly unpaid.

Your orator' further shows unto your honor that after the said promissory notes became due and payable they applied to the said George W. McClure and requested the payment of the same, which
he, the said George W. McClure, then and there refused to
63 do, and still refuses to pay the same according to the tenor and effect of said notes, and your orator had well hoped that their said request would have been complied with, but so it is, may it please your honor, the said defendants George W. McClure has refused and still doth refuse to pay your orator the said sums of money in the said several promissory notes and mortgage-deeds specified according to the tenor and effect thereof, or any part thereof, all of which actings and doings of the said defendant are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orators in the premises. In tender consideration whereof, and inasmuch as your orators is remediless in the premises and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are

properly relievable and cognisable to the end, therefore, that the said George W. McClure, to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to all and singular the matters and things aforesaid, but not under oath, your orators hereby waiving, pursuant to the statute, the necessity of said answers being under oath, and that, as fully and particularly as if the same were here repeated and he distinctly interrogated thereto, and your orators pray that upon the hearing thereof and account may be taken of what is due your orators upon said several promissory notes and mortgages, and that the said defendant may be ordered to pay the amount found to be due upon such account; being *ertsev* within a short day to be appointed by this court; and that in default thereof the said mortgaged premises may be sold under the decree and direction of this honorable court, and the proceeds arising from the sale of said premises be applied in satisfaction of said mortgage debts and the costs and charges of this proceeding, and that the said defendant and all persons claiming by, through, or under him,
64 subsequent to the commencement of this suit, either as purchasers, judgment-creditors, or otherwise, may be forever barred and foreclosed of all rights or equity of redemption in said mortgaged premises, and in case the monies arising from said sale shall be found insufficient to pay the amount found to be due your orators, with interest, costs, and expenses of sale, that a judgment may be rendered against the said defendant, George W. McClure, for such deficiency; and that an execution may be awarded therefore, and that your honor will grant unto your orators such other and further relief as in equity they may be entitled to have. May it please your honor to grant unto your orators the writ of chancery summons issuing out of and under the seal of this honorable court, directed to the sheriff of said county of Arapahoe, commanding him to summon the said defendant, George W. McClure, to be and appear before this honorable court on the first day of the next term thereof, and then and there to make full, true, and perfect answers to this your orators' bill of complaint, and further to stand to, perform, and abide such further orders, directions, and decrees therein as to this honorable court shall seem *meritu* and equitable. As in duty bound, your orators will ever pray.

CHARLES AND ELBERT,
Solicitors for Complainants.

EXHIBIT A.

$6,000.] DENVER, C. T., *February 2d*, 1867.

Three months from date I promise to pay Thomas Gaff and James W. Gaff, or order, six thousand dollars, with interest at the rate of three per cent. per month from date until paid, for value received.

(Signed) GEORGE W. McCLURE.

65 EXHIBIT B.

$6,000.] DENVER, C. T., *February 2d*, 1867.

Six months from date I promise to pay Thomas Gaff and James W. Gaff, or order, six thousand dollars, with interest at the rate of three per cent. per month from date until paid, for value received.

(Signed) GEORGE W. McCLURE.

EXHIBIT C.

$6,000.] DENVER, C. T., *February 2d*, 1867.

Nine months from date I promise to pay Thomas Gaff and James W. Gaff, or order, six thousand dollars, with interest at the rate of three per cent. per month from date until paid, for value received.

(Signed) GEORGE W. McCLURE.

EXHIBIT D.

This deed, made this second day of February, in the year of our Lord one thousand eight hundred and sixty-seven, between George W. McClure, of the county of Arapahoe and Territory of Colorado, of the first part, and Thomas Gaff and James W. Gaff, of Cincinnati, Ohio, of the County of Hamilton and State of Ohio, of the second part, witnesseth, that the said party, for and in consideration of the sum of eighteen thousand dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed unto the said party of the second part, their heirs and assigns, forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following-described lots or parcels of land, situate, bounded, lying and being in the county of Arapahoe and Territory of Colorado, to wit, lots number twenty-three, (23,) twenty-four, (24,) and twenty-five, (25,) in block number forty-six, and lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98,) all in the east division of Denver, to have and to hold
66 the same, together with all and singular the appurtenances and privile*d*ges thereunto belonging or in anywise thereto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, their heirs and assigns, forever, and the said party of the first part the aforesaid tract or parcel of land or premises unto the said party of the second part, their heirs and assigns, against the claim or claims of all and every person whatsoever; and the said George W. McClure doth and will warrant and forever defend by these presents: provided always, that these presents are upon this express condition, that if the said McClure, his executors or administrators, shall well and truly pay or cause to be paid to the said Thomas Gaff and James W. Gaff, their heirs, executors, administrators, or assigns, the sum of eighteen thousand dollars, in manner particularly specified in three notes, of six thousand dollars each, having even date herewith, executed by the said George W. McClure to the said Thomas Gaff and James W. Gaff, then and thenceforth these presents and everything herein contained shall cease and be void, everything herein contained to the contrary notwithstanding. In witness whereof the said party of the first part has hereto set his hand and seal this day and year first above written.

(Signed) GEORGE W. McCLURE.

Signed, sealed, and delivered in presence of
CHARLES Z. McCLURE.

[$20. Twenty-dollar U. S. internal-revenue stamp duly cancelled.]

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Charles G. Cheever, a notary public in and for said county, in

the Territory aforesaid, do certify that George W. McClure, who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this 2d (second) day of February, A. D. 1867.

67

[SEAL.] CHARLES G. CHEEVER,
Notary Public.

EXHIBIT E.

This deed, made this third day of September, in the year of our Lord one thousand eight hundred and sixty-six, between George W. McClure and Emma McClure, his wife, of the county of Arapahoe and Territory of Colorado, of the first part, and Austin M. Clark, of the county of Leavenworth and State of Kansas, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty thousand dollars to the said parties of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which the said parties of the first part have in and to the following-described lots or parcels of land, situate, lying, and being in the county of Arapahoe and Territory of Colorado, to wit: lots number twenty three, (23,) twenty-four, (24,) and twenty-five, (25,) in block number forty-six, (46,) and lots numbers (1,) one, (2,) two, (3,) three, (4,) four, (5,) five, and (6,) six, in block number ninety-eight, (98,) all in the east division of the city of Denver, county and Territory aforesaid, according to the plat of said city as surveyed by E. D. Boyd in the year one thousand eight hundred and fifty-nine, (A. D. 1859,) reference thereto will more fully and at large appear, to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever; and the said parties of the first part, the aforesaid tracts or parcels of land and premises unto the said party of the second part, his heirs and assigns, against the claims of all and every person whatsoever, George W. McClure and wife do and will warrant and forever defend by these presents; provided always, that these presents are upon this express condition, that if the said George W. McClure, his heirs, executors, *heirs*, or administrators shall well and truly pay or cause to be paid Austin M. Clark, his heirs, executors, administrators, or assigns, the sum of twenty thousand dollars and interest, in manner particularly specified in a promissory note executed by the said George W. McClure to the said Austin M. Clark, of which the following is a true copy:

68

(Copy.)

$20,000.] DENVER, ARAPAHOE COUNTY, COLORADO TERRITORY,
September 3d, 1866.

Twelve months after date I promise to pay to the order of Austin M.

Clark $20,000, (twenty thousand dollars,) with interest at the rate of 1½ (one and one-half) per cent. per month from date until paid, interest payable yearly, being secured by mortgage on lots Nos. 1, 2, 3, 4, 5, and 6, in block number ninety-eight, and lots numbers 23, 24, and 25, in block number forty-six, in Denver City, Colorado Territory, for value received.

(Signed) GEORGE W. McCLURE.

Then and thenceforth these presents and everything herein contained shall cease and be void, and everything herein contained to the contrary notwithstanding.

In witness whereof the said parties of the first part have hereunto their hands and seals the day and year first above written.

GEORGE W. McCLURE. [SEAL.]
EMMA McCLURE. [SEAL.]

Signed, sealed, and delivered in presence of—

[Twenty-dollar U. S. revenue-stamp duly canceled.]

69 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Charles G. Cheever, clerk in and for said county, in the Territory aforesaid, do hereby certify that George W. McClure and Emma McClure, personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as the free and voluntary act for the uses and purposes therein set forth; and the said Emma McClure, wife of the said George W. McClure, having been by me examined separate and apart and out of hearing of her husband, and the contents and meaning of said instrument of writing having been by me made known and fully explained to her, she acknowledged that she had freely and voluntarily executed the same and relinquished her dower to the lands and tenements therein mentioned without compulsion of her husband, and that she does not wish to retract the same.

Given under my hand and official seal this 13th day of September, 1866.

[SEAL.] CHARLES G. CHEEVER,
Clerk of Arapahoe County, Colorado Territory.

Proces' & return of required.

Master's report.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, within and for the county of Arapahoe, to the January term, A. D. 1869.

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. McCLURE. } In chancery.

70 Testimony and proofs taken this thirtieth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, in

the above cause, on the part of the complainant, before John W. Webster, one of the masters in chancery of this court. Present, Messrs. Charles and Elbert, solicitors for complainant; Messrs. Browne & Meckling, solicitors for defendant.

GEORGE T. CLARK, a witness produced on the part of the complainant, was duly sworn according to law by said master, and on being orally examined by solicitors, deposed and testified as follows:

Interrogatory 1st. What is your name, age, and place of residence?

Answer 1st. My name is George T. Clark. My age is twenty-one years. My residence is in the city of Denver, in the county of Arapahoe, and Territory of Colorado.

Interrogatory 2d. Are you acquainted with the complainants or respondent, or either of them?

Answer 2d. I do not know Thomas Gaff, but do know James W. Gaff and the respondent.

Interrogatory 3rd. Have you ever seen Austin M. Clark, of Leavenworth, Kansas, write, and, if yea, are you acquainted with his signature from having seen him write?

Answer 3d. Yes, sir; I have seen him write and know his signature.

Interrogatory 4th. Examine paper marked Exhibit "A" now shown to you and state if you know by whom it is indorsed, and state in whose handwriting the signature is indorsed.

Answer 4th. The signature is the handwriting of Austin M. Clark.

Interrogatory 5. Examine this paper, marked Exhibit "B," now shown to you, and state if you know by whom the same was assigned and whose signature is subscribed to said assignment.

Answer 5. The signature is in the handwriting of Austin M. Clark.

GEORGE T. CLARK.

Subscribed and sworn to before me this thirteenth day of December, A. D. 1869.

JOHN W. WEBSTER,
Master in Chancery.

71 The solicitors for the complainant then introduced in evidence four promissory notes and two mortgages, which are hereto attached, and marked Exhibits A, B, C, D, E, and F, respectively, and make a part of the proofs in this case, to the introduction of which the solicitors for the respondent objected.

JOHN W. WEBSTER,
Master in Chancery.

The taking of depositions and proofs is hereby adjourned, by agreement of solicitors, until ten o'clock *until* Tuesday, the 14th day of December, A. D. 1869, at my office in the city of Denver, and county of Arapahoe, and Territory of Colorado.

JOHN W. WEBSTER,
Master in Chancery.

Pursuant to the above adjournment, the taking of testimony and proofs in the above-entitled cause is resumed at my office, in the city of Denver, in the county of Arapahoe and Territory of Colorado, at ten o'clock a. m. on Tuesday, the fourteenth day of December, A. D. 1869. Present, Messrs. Charles & Elbert, solicitors for the complainants, and Messrs. Browne and Mechling, solicitors for the defendant.

GEORGE W. LANE, a witness produced on the part of the complainants, was duly sworn according to law by said master; and on being orally examined by solicitors, deposed and testified as follows:

Interrogatory 1st. What is your name, age, and place of residence?

Answer 1st. My name is George W. Lane; twenty-one years of age and upwards, and residence in the city of Denver, in the county of Arapahoe, and Territory of Colorado.

Interrogatory 2d. Are you acquainted with the parties complainant and respondent in the above-entitled cause?

Answer 2d. Yes, sir; I am.

Interrogatory 3d. State whether or not you ever transacted any business or conducted any negotiation between the complainant and respondent, and if yea, state when, where, and what it was, and give all the circumstances, particulars, times, places, and amounts connected with and relating to such transactions.

72 Answer 3d. I did negotiate business transactions between the parties in this cause. I met George W. McClure about the 15th day of January, A. D. 1867, at Leavenworth, in the State of Kansas; said McClure explained to me his anxiety for a loan of money, and after talking the matter over some time, furnished me with a written proposition for Thomas Gaff and James W. Gaff, for the loan of fifteen thousand dollars, which proposition is dated January 16th, 1867, and which is attached hereto and marked Exhibit E, and made a part of my answer to the above question. On the 18th day of January, A. D. 1867, I submitted this written proposition to Thomas and James W. Gaff, of Cincinnati, Ohio; on the next day, in the city of Cincinnati, State of Ohio, they furnished me with ten thousand dollars cash, and two accepted drafts for five thousand dollars each; with them I left Cincinnati, on the 19th day of January, A. D. 1867, and came directly west to Leavenworth, in Kansas, where I met with McClure, and together we came on to Denver, arriving at Denver, Colorado, on Sunday, the 27th or twenty-eighth day of January, A. D. 1867. On Monday Mr. McClure commenced the settlements as acting treasurer of the United States, appointed by me preparitory to handing over the monies, books, and papers and effects in his hands as such acting assistant treasurer. After counting the money on hand, and ascertaining his liabilities, he represented to me that he would need more money than was included in the written proposition marked Exhibit E aforesaid, and wished me to increase it to twenty thousand dollars; this I refused to do, but at last I agreed to loan him more money for Messrs. Gaffs, eighteen thousand dollars; we got through with our settlement by the second day of February, A. D. 1867, and on that day or the day previous, I handed him the ten thousand dollars in cash. I then cashed the two accepted drafts hereinbefore mentioned, at the First National Bank in Denver, and paid, under McClure's direction, the eight thousand dollars; that

73 not being sufficient to meet his deficit in the settlement of his accounts as said acting officer aforesaid, he gave me a check on Kountze's Bank, in Denver, for nineteen hundred and sixty-two dollars and fifty-eight cents, ($1,962.58,) on which check this money was drawn. After the payment of the eighteen thousand dollars, Mr. McClure signed the three notes for six thousand dollars each, heretofore attached as evidence and marked Exhibits C, D, and E respectively, and handed me a mortgage, duly signed, sealed, and acknowledged, on certain property in Denver securing said notes, which mortgage is the one heretofore introduced in evidence, marked Exhibit F; on the fourth day of

February, A. D. 1867, Mr. McClure gave me this pledge and agreement in relation to the notes and collaterals referred to in the within proposition, marked Exhibit G, aforesaid, and which *and which* is marked Exhibit H and made a part of my answer to the above question; that I reported all these facts to Messrs. Thomas and James W. Gaff, aforesaid complainants; in the transaction of the business I acted in behalf of and for George W. McClure, and at his request, solicitation, and request.

(Objected to by solicitors for respondent,

1st. Because the facts stated in said answer have no connection with the issues in this case.

2nd. Because the Exhibits G & H, made part of said answer, do not relate to the subject-matter of the controversy in this suit.)

Interrogatory 4th. State as whose agent you acted in taking the three notes marked Exhibits C, D, and E, and the mortgage securing the same, marked Exhibit F.

Answer 4. When the Messrs. T. and J. W. Gaff placed the money in my hands they instructed me to require mortgage security on the loan. With that instruction I required the notes and mortgage referred to, and Mr. McClure delivered them to me for said T. and J. W. Gaff, and in that respect I acted as their agent.

Interrogatory 5. State what you did with said notes and mort-
74 gage, and under whose direction.

Answer 5th. I placed said notes in my desk, on my desk, on the day they were executed, and on the same day deposited the mortgage for record. Afterwards, on or about the 12 day of March, 1867, I withdrew said mortgage from the recorder's office and placed it with the notes in my desk in the U. S. branch mint, Denver, Colorado, where they remained until delivered to Charles and Elbert, Esqs., on the written order of said T. and J. W. Gaff.

Interrogatory 6. State if you know where Mr. McClure resided at the date of this proposition marked Exhibit "G," and where he has resided since that date.

(Objected to by solicitor for respondent for irrelevancy and incompetency.)

Answer 6. In the city of Denver, county of Arapahoe, and Territory of Colorado.

Interrogatory 7. Where was the eighteen thousand dollars paid over to Mr. McClure, and when was his notes for the same and the mortgage securing the notes handed over to you?

(Objected to by solicitor for respondent.)

Answer. All in the city of Denver, in the Territory of Colorado.

By agreement of solicitors the taking of testimony and proofs in this cause is hereby adjourned until Thursday, the 16th day of December, A. D. 1869, at 10 o'clock a. m., at my office in the city of Denver, in the county of Arapahoe and Territory of Colorado.

JOHN W. WEBSTER,
Master in Chancery.

Pursuant to the above adjournment, the taking of testimony and proofs in the above-entitled cause on the part of the complainant was resumed at my office in the city of Denver, in the county of Arapahoe and Territory aforesaid, on the 16th of December, 1869, at 2 o'clock p. m.

Present: Messrs. Charles & Elbert, solicitors for complainants, and Messrs. Browne and Meckling, for respondent.

75 GEORGE W. LANE, a witness heretofore produced, having been duly sworn, in continuation of his testimony, deposed and testified as follows:

Interrogatory 8. You state in your answer to interrogatory third that you left Cincinnati, Ohio, January 19th, 1867; at what time thereafter did you return to Cincinnati?

Answer 8. Not for two years. I left Denver the latter part of January, 1869, for the East, and arrived in Cincinnati in February, 1869.

Interrogatory 9. Did you or did you not show Messrs. T. & J. W. Gaff, or either of them, the notes and mortgage marked "Exhibits C, D, E, & F," within thirty days after their date, or at any other time in Cincinnati, Ohio, or any other place.

Answer. 9. I never showed said notes or mortgage, or either or any of them, to Thomas Gaff or James W. Gaff, or either of them, at any time in Cincinnati, or at any other place; and I do not know that they ever saw them, but I do know that they did not see them within the next thirty or sixty days after their date.

Interrogatory 10. At the time you obtained the money of the said complainants in Cincinnati, Ohio, did you have the notes and mortgage marked "Exhibits C, D, E, & F" with you and were they executed at that time?

Answer 10. When in Cincinnati, Ohio, on the 18th & 19th days of January, 1867, before referred to as the time I received the money from T. and J. W. Gaff, I did not have the notes and mortgage marked "Exhibits C, D, E, & F," and they were not written at that time, but were written, signed, and executed in Denver, Colorado, on the second day of February, A. D. 1867, as appears on their face.

Cross-examined by solicitors of defendant:

Cross-interrogatory 1. Are you acquainted with the handwriting and signatures of Thomas Gaff and James W. Gaff?

Answer 1. I am.

Cross-interrogatory 2. Look at the signatures appended to the deposition, indorsed "George W. McClure vs. George W. Lane; deposition opened, published, and filed as per order of court February 12th,
76 1869; Henry A. Clough, clerk," and state whose signatures they are.

Answer 2. I have looked at the deposition referred to, and the signatures referred to are those of Thomas and J. W. Gaff.

Interrogatory 3d. Are or are not these persons the complainants in this suit?

Answer 3d. They are.

GEORGE W. LANE.

Subscribed and sworn to before me this 16th day of December, 1869.

JOHN W. WEBSTER,
Master in Chancery.

The solicitors for the defendant now offer in evidence the deposition mentioned and set forth in cross-interrogatory No. 2, which is hereto attached, and marked Exhibit 1, (one,) and makes a part of the proofs in this case; to the introduction of which the solicitors for the complainants object, on the ground that it is incompetent, immaterial, and irrelevant; all objections to the foregoing questions on the ground that it is not proper cross-examination *and* waived by solicitors for complainants; and, also, that all objections to the taking of the testimony of

George W. Lane at this time *is* hereby waived by solicitors for respondent.

JOHN W. WEBSTER,
Master in Chancery.

The taking of further testimony and proofs in this case is hereby adjourned at the request of solicitor for complainant and defendant until Wednesday the 29th day of January, A. D. 1870, at 10 o'clock a. m., at the master's office, in the city of Denver.

Exhibit G, referred to in the foregoing proof and deposition of George W. Lane.—JOHN W. WEBSTER, *Master in Chancery.*

I propose to Thomas Gaff and James W. Gaff to borrow fifteen thousand dollars, for the use of which I agree to pay three per cent.
77 per month from date until paid, and agree to execute my note, payable on or before the expiration of three months; and I further bind myself and agree to transfer to, and place in the hand of Amos Lane the following notes, debts, claims, &c., with full power to collect the same, and pay the first proceeds to the said Gaffs, or the holders of said note of fifteen thousand dollars until the principal and interest are fully paid, the balance to be returned to me; that is to say—

First. A note against John Corrill, indorsed by Scudder & Crocker, drawing three per cent. per month, note and interest, to July 1st, 1867	3,500 00
Second. Three note' against George Roper, secured by mortgage on brick house and lot, and drawing three per cent. per month int	2,600 00
Third. Eleven notes against A. R. Palmer for 400$ each, three per cent. per month int., with the interest payable monthly, and one month's interest due, secured by bill of sale on stock of goods invoiced, within six weeks, at $11,000.00, possession taken, pays weekly	4,400 00
Fourth. A judgment against John Henry, that can be collected after court adjourns, a lien on property worth $18,000	8,000 00
Fifth. Bonds secured by mortgage on forty acres of land adjoining Denver, amounting	$5,300 00
Making in all	23,800 00

which I agree to place, as aforesaid, as collateral security for the payment of said note and interest.

Leavenworth, K., January 16th, 1867.

GEORGE W. McCLURE.

Exhibit H, referred to in the foregoing deposition of George W. Lane.—JOHN W. WEBSTER, *Master in Chancery.*

I, George W. McClure, pledge myself and agree with Thomas Gaff and James W. Gaff, that I will proceed at once to collect the claims mentioned in my proposition of the day of January, A. D. 1867,
78 and as fast as I realize on the same to pay over to them or their agent, to be credited on the notes I gave them for the sum of $18,000.00; and it is further understood that said notes, claims, judg-

ment are left in my hands for collection, and I am to account to said Gaffs for the amounts collected and apply the proceeds as above.

Denver, February 4th, 1867.

GEORGE W. McCLURE.

Dedimus potestatim—Exhibit referred to in the foregoing proofs.—JOHN W. WEBSTER, *Master in Chancery.*

TERRITORY OF COLORADO,
Arapahoe County, ss:

The people of the Territory of Colorado to Isaac Simons, esq., of the city of Cincinnati, in the State of Ohio, greeting:

Whereas it has been represented to us that Thomas Gaff, and James W. Gaff, of said city and State, are material witnesses in a certain cause now pending in our district court for the first judicial district of Colorado Territory, in and for the county of Arapahoe, wherein George W. McClure is plaintiff, and George W. Lane is defendant; and that the said witnesses reside at said city aforesaid without the said Territory of Colorado, and that their personal attendance cannot be procured at the trial of the said cause: Now know ye that we, in confidence of your prudence and fidelity, have appointed, and by these presents do appoint, you commissioner to examine the said witnesses, and do therefore authorize and require you to cause the said witnesses to come before you at such time and place as you may therefor designate and appoint, and dil*l*igently to examine the said witnesses, on the oath or affirmation of the said witnesses by you first duly in that behalf administered, and faithfully to take the deposition of the said witnesses upon all interrogatories and cross-interrogatories enclosed with or attached to these presents, both on the part of the said plaintiff and the said defendant, and none others, and the same when thus taken, together with this commission and the said interrogatories, to certify unto
79 our said district court with the least possible delay.

Witness, Henry A. Clough, clerk of the district court, and the seal thereof, at Denver City, in said county and Territory, this 28th day of December, A. D. 1868.

[SEAL.] HENRY A. CLOUGH, *Clerk.*

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, in and for the county of Arapahoe, to the January term, A. D. 1869.

GEORGE W. McCLURE
vs.
GEORGE W. LANE. } Assumpsit.

The above-named defendant is hereby notified that on the 28th day of December, A. D. 1868, I will issue out of the office of the clerk of the district court of said judicial district of Colorado Territory in and for the said county of Arapahoe, a dedimus potestatim, or commission, to be addressed to Isaac Simons, esq.. of the city of Cincinnati, in State of Ohio, as commissioner to take the depositions of Thomas Gaff and James W. Gaff, of said city, to be used in evidence on the trial of the

above-entitled cause, now pending and undetermined in the said district court of said county, on the common-law side, and that a copy of the interrogatories thereto will be appended to said dedimus potestatim to be propounded to said witnesses on the part and in behalf of said plaintiff, and you can join on said commission and file cross-interrogatories if you see fit.

BROWNE & MECHLING,
Attorneys for Plaintiff.

CHARLES & ELBERT,
Attorneys for Defendant.

80 TERRITORY OF COLORADO,
County of Arapahoe, ss :

In the district court aforesaid, to the January term, A. D. 1869.

Interrogatories to be propounded to witnesses, Thomas Gaff and James W. Gaff, respectively, witnesses to be produced, examined under and by virtue of the dedimus potestatem or commission, to be issued in pursuance of the annexed notice.

Interrogatory 1st. What is your name, age, and place of residence?

2d. Are you acquainted with the parties to the aforesaid suit, George W. McClure and George W. Lane?

3d. Do you or do you not, either in person or with another, hold any mortgage or any real estate signed by George W. McClure? If you answer yes, then state when said mortgage was executed, by whom it was executed, and the amount of money it was made to secure the repayment of.

4th. Was any money paid by you on said mortgage? If so, state how much and at what time.

5th. If you, or if you and another, did advance any money on said mortgage, state when and where, and to whom you paid said money, and who delivered said mortgage to you, if it was ever so delivered.

BROWNE & MECHLING,
Attorneys for Plaintiff.

Cross-interrogatories to be propounded to witnesses, on part of the defendant.

Cross-interrogatory 1st. If, in answer to the third, fourth, and fifth direct interrogatory, you state that you in person, or with another, do hold a mortgage signed by George W. McClure, and that you advanced him money on the same, please state whether the said George W. McClure has ever paid said mortgage or any part thereof to you, or to you and another, as the case may be, and whether said mortgage and the money advanced thereon does not still remain due and unpaid.

81 (Objected to by plaintiff's attorneys.)

CHARLES & ELBERT,
Defendant's Attorneys.

(Indorsed:) George W. McClure vs. George W. Lane. Notice and interrogatories.

The deposition of Thomas Gaff, of Aurora, State of Indiana, and James W. Gaff, of the city of Cincinnatti, county of Hamilton & State of Ohio, witnesses of lawful age, produced, sworn, and examined upon

their corporal oaths, on the 27th day of January, A. D. 1869, at the office of Simons & Hompshemer, No. 21 West Third street, in the city of Cincinnatti, in the county of Hamilton, in the State of Ohio aforesaid, by M. Isaac Simons, a commissioner duly appointed by a dedimus potestatem issued out of the clerk's office of the district court of Arapahoe County, in the Territory of Colorado, having teste in the name of Henry A. Clough, esq., clerk of the said district court and the seal of the said court affixed thereto, and directed to me as said commissioner, for the examination of the said Thomas Gaff and J. W. Gaff, witnesses in a certain suit and matter in controversy then pending and undetermined in said district court, wherein George W. McClure is plaintiff and George W. Lane is defendant, on behalf of the plaintiff, as well as upon the cross-interrogatories of the defendant as upon the interrogatories of the plaintiff, which were attached to and included with the said commission, and upon none others.

The said THOMAS GAFF, being by me first duly sworn as a witness in said cause previous to the commencement of his examination to testify the truth, as well on the part of the plaintiff as on the part of the defendant, in relation to the matters in controversy between the plaintiff and the said defendant, so far as he should be interrogated, testified and deposed as follows:

Interrogatory 1st. What is your name, age, and place of residence?

Answer 1. My name is Thomas Gaff. My age is sixty-four. My residence is Aurora, Indiana.

Interrogatory 2d. Are you acquainted with the parties to the
82 aforesaid suit, George W. McClure and George W. Lane?

Answer 2d. I am acquainted with George W. Lane.

Interrogatory 3d. Do you, or do you not, either in person or with another, hold any mortgage on any real estate, signed by George W. McClure? If you answer yes, then state when such mortgage was executed, by whom it was executed, and the amount of money it was made to secure the repayment of.

Answer 3. Yes; the firm of T. & J. W. Gaff, that is myself and J. W. Gaff, hold a mortgage signed by George W. McClure, the same being dated February 2d, 1867, as we believe, and executed by George W. McClure, to secure the payment of eighteen thousand dollars and interest.

Interrogatory 4. Was any money paid by you on said mortgage? If so, state how much and at what time.

Answer 4. The full sum of eighteen thousand dollars was paid by T. & J. W. Gaff, at or about that time.

Interrogatory 5. If you, or if you and another, did advance any money on said mortgage, state when, where, and to whom you paid said money, and who delivered said mortgage to you, if it ever was so delivered.

Answer 5. T. & J. W. Gaff advanced the amount mentioned in said mortgage on a written application, through George W. Lane, by George W. McClure; the money was paid to said McClure by said Lane on or about the 1st of February, 1867, at Denver, Colorado Territory. To enable Mr. Lane to do so, we paid him, Lane, ten thousand dollars cash in Cincinnatti, Ohio, and authorized him to fill up an acceptance for the balance, which we paid upon presentation here. This mortgage was delivered by said McClure to said Lane, at the instance of T. & J. W. Gaff, and under their direction was placed on record in Arapahoe County, and afterwards he complied with our order and delivered it to Messrs. Charles and Elbert, our attorneys.

83 Cross-interrogatory and answer thereto by the witness on the part of the defendant.

Interrogatory 1st. If, in answer to the third, fourth, and fifth direct interrogatories, you state that you in person, or with another, hold a mortgage signed by George W. McClure, and that you advanced him money on the same, please state whether or not the said George W. McClure has ever paid said mortgage, or any part thereof, to you, or to you and another, as the case may be, and whether said mortgage and the money advanced thereon does not still remain due and unpaid.

Answer 1st. He has never paid the same, or any part thereof, to me, or to any one for me, or on behalf of said T. & J. W. Gaff; said mortgage still remains due and unpaid.

THOS. GAFF.

JAMES W. GAFF, being by me first duly sworn as a witness in the said cause, previous to the commencement of his examination, to testify the truth, as well on the part of the plaintiff as of the defendant, in relation to the matter in controversy between the said plaintiff and the sa id defendant, so far as he should be interrogated, testified and deposed as follows:

Interrogatory 1st. What is your name, age, and place of residence.

Answer 1. My name is J. W. Gaff; age, fifty-one; and residence Cincinnatti, Ohio.

Interrogatory 2d. Are you acquainted with the parties to the aforesaid suit, George W. Lane and George W. McClure?

Answer 2. I am acquainted with all the parties to said suit.

Interrogatory 3d. Do you or do you not, either in person or with another, hold any mortgage on any real estate signed by George W. McClure? If you answer yes, then state when such mortgage was executed, by whom it was executed, and the amount of money it was made to secure the payment of.

Answer 3d. The firm of T. &. J. W. Gaff do hold such a mortgage, of which firm I am a member; said mortgage was executed Feb-
84 ruary 2d, 1867, to the best of my recollection, by George W. McClure; it was made to secure the payment of eighteen thousand dollars, with interest.

Interrogatory 4th. Was any money paid by you on said mortgage? If so, state how much, and at what time.

Answer 4th. T. & J. W. Gaff advanced eighteen thousand dollars about February 2d, 1867.

Interrogatory 5th. If you, or if you and another, did advance any money, state when, where, and to whom you paid said money, and who delivered said mortgage to you, if it ever was so delivered.

Answer 5. T. & J. W. Gaff, through George W. Lane, advanced the sum mentioned in the mortgage, upon the application of George W. McClure, through George W. Lane. The money was paid to said McClure by said Lane on or about the 1st of February, 1867, at Denver, Colorad'. We paid him some ten thousand dollars cash in Cincinnatti, and authorized him to fill up an acceptance for the balance, which we paid upon presentation here. The mortgage was delivered by said McClure to said Lane at the instance of T. & J. W. Gaff, and under their direction was placed upon record in Arapahoe County, and afterwards, in compliance with an order, was delivered to Messrs. Charles & Elbert, our attorneys.

cross-interrogatory and answer thereto by the witness on the part of the defendant.

Interrogatory 1. If, in answer to the third, fourth, and fifth direct interrogatories, you state that you in person, or with another, do hold a mortgage signed by George W. McClure, and that you advanced him money upon the same, please state whether or not the said George W. McClure has ever paid said mortgage, or any part thereof, to you, or to you and another, as the case may be, and whether said mortgage and the money advanced thereon does not still remain due and unpaid.

Answer 1. He has never paid the same, nor any part thereof, to me, or to any one on behalf of T. & J. W. Gaff; said mortgage still remains due and unpaid, and interest.

J. W. GAFF.

I, Isaac Simons, of the County of Hamilton, and State of Ohio, a commissioner duly appointed to take the depositions of Thomas Gaff and J. W. Gaff, witnesses, whose names are subscribed to the foregoing deposition, do hereby certify that, previous to the examination of the said Thomas Gaff and J. W. Gaff as witnesses in the said suit between the said George W. McClure, plaintiff, and the said George W. Lane, defendant, they were duly sworn by me to testify the truth in relation to the matter in controversy between the said parties, so far as they should be interrogated concerning the same; that the said deposition was taken by me, Isaac Simons, and reduced to writing by me at my office, in the city of Cincinnatti, in the county of Hamilton, and in the State of Ohio, on the 27th day of January, A. D. 1869, and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to said witnesses, and that thereupon the same were signed and sworn to by the said deponents, Thomas Gaff and J. W. Gaff, before me, at the place and on the day and year last aforesaid.

ISAAC SIMONS,
Commissioner.

(Indorsed:) George W. McClure vs. George W. Lane. Depositions opened, published, and filed as per order of court, February 12th, 1869.
HENRY A. CLOUGH, *Clerk.*

County of Arapahoe, and Territory of Colorado.
JOHN W. WEBSTER,
Master in Chancery.

Pursuant to agreement, on this 29th day of June, 1870, at the master's office in said city, county, and Territory, the further taking of testimony and proofs in this cause is closed, by agreement of parties.

86

JOHN W. WEBSTER,
Master in Chancery.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE. } In chancery.

Master's report.

To the honorable Christian S. Eyster, judge of the district court of the

83 Cross-interrogatory and answer thereto by the witness on the part of the defendant.

Interrogatory 1st. If, in answer to the third, fourth, and fifth direct interrogatories, you state that you in person, or with another, hold a mortgage signed by George W. McClure, and that you advanced him money on the same, please state whether or not the said George W. McClure has ever paid said mortgage, or any part thereof, to you, or to you and another, as the case may be, and whether said mortgage and the money advanced thereon does not still remain due and unpaid.

Answer 1st. He has never paid the same, or any part thereof, to me, or to any one for me, or on behalf of said T. & J. W. Gaff; said mortgage still remains due and unpaid.

THOS. GAFF.

JAMES W. GAFF, being by me first duly sworn as a witness in the said cause, previous to the commencement of his examination, to testify the truth, as well on the part of the plaintiff as of the defendant, in relation to the matter in controversy between the said plaintiff and the sa id defendant, so far as he should be interrogated, testified and deposed as follows:

Interrogatory 1st. What is your name, age, and place of residence.

Answer 1. My name is J. W. Gaff; age, fifty-one; and residence Cincinnatti, Ohio.

Interrogatory 2d. Are you acquainted with the parties to the aforesaid suit, George W. Lane and George W. McClure?

Answer 2. I am acquainted with all the parties to said suit.

Interrogatory 3d. Do you or do you not, either in person or with another, hold any mortgage on any real estate signed by George W. McClure? If you answer yes, then state when such mortgage was executed, by whom it was executed, and the amount of money it was made to secure the payment of.

Answer 3d. The firm of T. &. J. W. Gaff do hold such a mortgage, of which firm I am a member; said mortgage was executed Feb-
84 ruary 2d, 1867, to the best of my recollection, by George W. McClure; it was made to secure the payment of eighteen thousand dollars, with interest.

Interrogatory 4th. Was any money paid by you on said mortgage? If so, state how much, and at what time.

Answer 4th. T. & J. W. Gaff advanced eighteen thousand dollars about February 2d, 1867.

Interrogatory 5th. If you, or if you and another, did advance any money, state when, where, and to whom you paid said money, and who delivered said mortgage to you, if it ever was so delivered.

Answer 5. T. & J. W. Gaff, through George W. Lane, advanced the sum mentioned in the mortgage, upon the application of George W. McClure, through George W. Lane. The money was paid to said McClure by said Lane on or about the 1st of February, 1867, at Denver, Colorad'. We paid him some ten thousand dollars cash in Cincinnatti, and authorized him to fill up an acceptance for the balance, which we paid upon presentation here. The mortgage was delivered by said McClure to said Lane at the instance of T. & J. W. Gaff, and under their direction was placed upon record in Arapahoe County, and afterwards, in compliance with an order, was delivered to Messrs. Charles & Elbert, our attorneys.

Cross-interrogatory and answer thereto by the witness on the part of the defendant.

Interrogatory 1. If, in answer to the third, fourth, and fifth direct interrogatories, you state that you in person, or with another, do hold a mortgage signed by George W. McClure, and that you advanced him money upon the same, please state whether or not the said George W. McClure has ever paid said mortgage, or any part thereof, to you, or to you and another, as the case may be, and whether said mortgage and the money advanced thereon does not still remain due and unpaid.

Answer 1. He has never paid the same, nor any part thereof, to me, or to any one on behalf of T. & J. W. Gaff; said mortgage still re-
85 mains due and unpaid, and interest.

J. W. GAFF.

I, Isaac Simons, of the County of Hamilton, and State of Ohio, a commissioner duly appointed to take the depositions of Thomas Gaff and J. W. Gaff, witnesses, whose names are subscribed to the foregoing deposition, do hereby certify that, previous to the examination of the said Thomas Gaff and J. W. Gaff as witnesses in the said suit between the said George W. McClure, plaintiff, and the said George W. Lane, defendant, they were duly sworn by me to testify the truth in relation to the matter in controversy between the said parties, so far as they should be interrogated concerning the same; that the said deposition was taken by me, Isaac Simons, and reduced to writing by me at my office, in the city of Cincinnatti, in the county of Hamilton, and in the State of Ohio, on the 27th day of January, A. D. 1869, and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to said witnesses, and that thereupon the same were signed and sworn to by the said deponents, Thomas Gaff and J. W. Gaff, before me, at the place and on the day and year last aforesaid.

ISAAC SIMONS,
Commissioner.

(Indorsed:) George W. McClure vs. George W. Lane. Depositions opened, published, and filed as per order of court, February 12th, 1869.
HENRY A. CLOUGH, *Clerk.*

County of Arapahoe, and Territory of Colorado.
JOHN W. WEBSTER,
Master in Chancery.

Pursuant to agreement, on this 29th day of June, 1870, at the master's office in said city, county, and Territory, the further taking of testimony and proofs in this cause is closed, by agreement of parties.
86 JOHN W. WEBSTER,
Master in Chancery.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE. } In chancery.

Master's report.

To the honorable Christian S. Eyster, judge of the district court of the

first judicial district of the Territory of Colorado, within and for the county of Arapahoe, presiding in chancery, to the June term, A. D. 1870:

In pursuance and in virtue of an order of this court, made, in the above-entitled cause, and bearing date the 26th day of November, A. D. 1869, by which it was referred to one of the masters of this court to compute, ascertain, and report the amount due the complainants, for principal and interest on the notes and mortgages mentioned and set forth in the bill of complaint filed in this cause, and to take proofs of the facts and circumstances mentioned in said bill, and report thereon to this court with all convenient speed, I, the subscriber, one of the masters in chancery of this court, residing in the county of Arapahoe, do respectfully report that I have compiled and ascertained the amount due to the complainants in this cause a' aforesaid, and that the amount so due on the said notes and mortgages, for the principal and interest up to and including the date of this report, is the sum of sixty-nine thousand and sixty-six dollars, ($69,066.) And I do further certify and report that the schedule hereunto annexed, marked W, and making a part of this my report, contains a statement and account of the principal and interest monies due to the complainants as aforesaid;
87 the period of the computation of the interest and its rate, and to which, for greater certainty, I refer. And I do further certify and report that I have taken the testimony of George T. Clarke and George W. Lane, witnesses produced on the part of complainants in this cause, which I have hereunto annexed and made a part of this report. And I do further certify and report that I have marked and attached Exhibits *Exhibits* A, B, C, D, E, F, G, & H, introduced on the part of the complainants, and which are made a part of this report; and, also, that I have marked and attached exhibits I introduced on the part of defendant, and which is made a part of this report. And having taken proof of the facts and circumstances stated in the complainants' bill of complaint in this cause, I find the several matters stated in said bill to be true, and that they have been sufficiently proved before me, and would most respectfully recommend unto your honor a decree in accordance with the prayer of the complainants in their bill of complaint. All of which is most respectfully submitted.

Denver, June 29th, 1870.

JOHN W. WEBSTER,
Master in Chancery.

Schedule marked "W" in the preceding report.

One promissory note, dated September 3d, 1866, payable twelve months after date to the order of Austin M. Clarke for the sum of twenty thousand dollars, with interest at the rate of one and one-half (1½) per cent. per month from date till paid, interest payable yearly, being secured by a mortgage of the same date on lots Nos. 1, 2, 3, 4, 5, and 6, in block number 98, and lots numbers 23, 24, and 25, in block number 46, in Denver City, Colorado Territory, for value received; on the back of which said note is indorsed as follows: "Interest paid to January 21st, 1867; interest paid to January 1st, 1868; assigned and transfer'ed to T. and J. W. Gaff, without recourse excepting any de-
88 mands, claims, defences, or offsets which the said McClure may legally establish against the same note and mortgage, and that the amount paid now is due and payable on the same, September 28th, 1868. Austin M. Clarke;" which note is accompanied by a mortgage of

the same date, stamped with a twenty-dollar revenue-stamp, according to law, and on the back of which I find an indorsement in the exact words and figures of the endorsement on the back of the note above described, and having the same signatures and date.

Also, three other certain promissory notes, each bearing date February 2d, 1867, one payable in three months from date, one payable in six months from date, and one payable in nine months from date, each one payable to Thomas Gaff and James W. Gaff or order, each for the sum of six thousand dollars, amounting to eighteen thousand dollars in all, with interest on each note, respectively, at the rate of three (3) per cent. per month from date until paid; on the back of which notes are no indors'ments of any kind or nature; which said three notes are accompanied and secured by a mortgage, bearing the same date, on lots numbere 23, 24, and 25, in block number 46, and lots number 1, 2, 3, 4, 5, and 6, in block number ninety-eight, in the east division of the city of Denver, said mortgage being stamped with seventeen dollar' of revenue-stamps, according to law.

FIRST NOTE MARKED "EXHIBIT A."

Principal sum due		$20,000 00
Int. on same from Sept. 3, 1866, to Jan'y 21st, 1867, being four months and 18 days, at 1½ per cent. per month		1,380 00
Due January 21st, 1867		21,380 00
Interest paid Jan'y 21st, 1867		1,380 00
		20,000 00
Interest on same from Jan'y 21st, 1867, to January 1st, 1868, being 11 months and 20 days, at one and one-half per cent. per month		3,500 00
		23,500 00
Interest paid Jan'y 1st, 1868		3,500 00
		20,000 00
Interest on same from January 1st, 1868, to June 29th, 1870, being two years, five months, and twenty-eight days, at one and one-half per cent. per month		8,980 00
Due June 29th, 1870		28,980 00

The interest on the above note amounts to 10 $ per day.

SECOND NOTE, MARKED "EXHIBIT C."

Principal sum du'	6,000 00	
Interest on the same from February 2d, 1867, to June 29th, 1870, being three years, four months, and twenty-seven days, at 3 per cent. per month	7,362 00	
		13,362 00

THIRD NOTE, MARKED "EXHIBIT D."

Principal sum due	6,000 00	
Interest on the same from February 2d, 1867, to June 29th, 1870, being 3 years, 4 months and 27 days, at 3 per cent. per month	7,362 00	
		13,362 00

FOURTH NOTE, MARKED "EXHIBIT E."

Principal sum due	$6,000 00	
Interest on the same from February 2d, 1867, to June 29th, 1870, three years, 4 months & 27 days, at 3 per cent. per month	7,362 00	
		13,362 00
Total amount due complainants June 29th, 1870		69,066 00

All of which is respectfully submitted.
Denver, June 29th, 1870.

JOHN W. WEBSTER,
Master in Chancery.

90 Master's fees: Taking testimony & marking exhibits, 5.00; computing amounts due, 15.00; report to court, 5—total, 25.00.

(Indorsed:) Thomas & J. W. Gaff vs. George W. McClure. Master's report. Amount due. Confirmed by the court July 1st, 1870. C. S. Eyster. Filed July 1st, 1870. Oliver A. Whitemore, clerk.

Exhibit A, referred to in preceeding proofs.

[U. S. revenue-stamp on mortgage.]

$20,000.] DENVER, ARAPAHOE COUNTY, COLORADO TERRITORY,
September 3d, 1866.

Twelve months after date, I promise to pay to the order of Austin M. Clark $20,000, (twenty thousand dollars,) with interest, at the rate of 1½ (one and one-half) per cent. per month from date till paid, interest payable yearly, being secured by mortgage on lots numbers 1, 2, 3, 4, 5, and six, in block number 48, and lots No'. 23, 24, & 25, in block No. 46, in Denver City, Colorado Territory, for value received.

GEORGE W. McCLURE.

(On the back of which is indorsed:) Interest paid to January 1st, 1867. Interest paid to January 21st, 1868. Assigned & transferred to T. & J. W. Gaff, without recourse, excepting any demands, claims, defense, or offset which the said McClure may legally establish against the said not' and mortgage, and that the amount paid me is due and payable on the same September 28th, 1868.

AUSTIN M. CLARKE.

Exhibit A, referred to in preceeding proofs. John W. Webster, master in chancery.

91 EXHIBIT B.

[Internal-revenue stamp, twenty dollars.]

This deed, made this third day of September, in the year of our Lord one thousand eight hundred and sixty-six, between George W. McClure and Emma McClure, his wife, of the county of Arapahoe, and Territory of Colorado, of the first part; and Austin M. Clarke, of the county of Leavenworth, and State of Kansas, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of twenty thousand dollars to the said parties of the first in hand paid by the said party of the second part, the receipt whereof is hereby con-

fessed and acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which the said parties of the first part have in and to the following-described lots or parcels of land, situate, lying, and being in the county of Arapahoe, and Territory of Colorado, to wit, lots number (23,) twenty-three, (24,) twenty-four, and (25,) twenty-five, in block number forty-six, (46;) and lots number (1,) one, (2,) two, (3,) three, (4,) four, (5,) five, and (6,) six, in block number ninety-eight, (98;) all in the east division of the city of Denver, county and Territory aforesaid, according to the plat of said city, as surveyed by Ed. Boyde, in the year one thousand eight hundred and fifty-nine, (1859,) reference thereto will more fully and at large appear:

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining; and all the estate, right, title, interest, and claim, whatsoever, of the said parties of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever; and the said parties of the first part, the aforesaid parcels or tracts of land or premises, unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person whatsoever, George W. McClure & wife do and will warrant and forever defend by these presents: pro-
92 vided always, that these presents are upon this express condition, that, if the said George W. McClure, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said Austin M. Clark, his heirs, executors, or administrators, or assigns, the sum of twenty thousand dollars and interest, in manner particularly specified in a promissory note, bearing even date herewith, executed by the said George W. McClure to the said Austin M. Clarke, of which the following is a true copy:

20,000$.] DENVER, ARAPAHOE COUNTY, COLORADO TERRITORY,
September 3d, A. D. 1866.

Twelve months after date, I promise to pay to the order of Austin M. Clarke, $20,000, (twenty thousand dollars,) with interest at the rate of 1½ (one and one-half) per cent. per month from date till paid, interest payable yearly, being secured by mortgage on lots numbered 1, 2, 3, 4, 5, and 6, in block Nos. 98; and lots No. 23, 24, & 25, in block No. 46, in Denver City, Colorado Territory, for value received.

(Signed) GEORGE W. McCLURE.

To the said Austin M. Clarke then & thenceforth these presents and everything herein contained shall cease and be void, everything herein contained to the contrary notwithstanding.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

GEORGE W. McCLURE. [SEAL.]
EMMA McCLURE. [SEAL.]

Signed, sealed, and delivered in presence of—

———— ————.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Charles G. Cheever, clerk in and for said county, in the Territory

aforesaid, do hereby certify that George W. McClure and Emma McClure, personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me in person this day and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and
93 purposes therein set forth, and the said Emma McClure, wife of the said George W. McClure, having been by me examined separate and apart, and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me made known and fully explained to her, she acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned without compulsion of her husband, and that she does not wish to retract the same.

Given under my hand and official seal this fifteenth day of September, A. D. 1866.

[SEAL.]

CHARLES G. CHEEVER,
Clerk of Arapahoe County, Colorado Territory.

(On which is indorsed:) 5161. Assigned to T. & J. W. Gaff, without recourse, excepting any demands, claims, defences, or offset which the said McClure may legally establish against the said note and mortgage, and that the amount paid me is due and payable on the same.

September 28th, 1868.

AUSTIN M. CLARKE.

Filed for record September 15th, 1866, at 11 o'clock a. m. Recorded in book 11, page 521.

CHARLES G. CHEEVER,
Clerk & Recorder of Arapahoe County, Colorado Territory.

The assignment of this mortgage was filed for record March 18th, 1869, at 11 o'clock a. m., and duly recorded in book 11, page 522.

W. D. ANTHONY, *Recorder.*

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I do hereby certify that this is a true and correct copy of the original Exhibit B attached to the master's report, and that this copy is substituted instead of original by order of court, made and entered of record July 3d, 1871.

GEORGE H. MILLS,
Clerk District Court.

JULY 6, 1871.

94 *Exhibit C, referred to in proofs.*—JOHN W. WEBSTER, *master in chancery.*

$6,000.] DENVER, C. T., *February 2d*, 1867.

Three months from date, I promise to pay Thomas Gaff and James W. Gaff, or order, six thousand dollars, with interest at the rate of three per cent. per month from date until paid, for value received.

GEORGE W. McCLURE.

Exhibit D, referred to in proofs.—JOHN W. WEBSTER, *master in chancery.*

$6,000.] DENVER, C. T., *February 2d*, 1867.

Six months from date, I promise to pay to Thomas Gaff and James

W. Gaff, or order, six thousand dollars, with interest at the rate of three per cent. per month from date until paid, for value received.

GEORGE W. McCLURE.

Exhibit E, referred to in proofs.—JOHN W. WEBSTER, *master in chancery.*

$6,000.] DENVER, C. T., *February 2d*, 1867.

Nine months from date, I promise to pay to Thomas Gaff and James W. Gaff, or order, six thousand dollars, with interest at the rate of three per cent. per month from date until paid, for value received.

GEORGE W. McCLURE.

Exhibit F, referred to in foregoing proofs.—J. W. W., *master in chancery.*

This deed, made this second day of February, in the year of our Lord one thousand eight hundred and sixty-seven, between George W. McClure, of the county of Arapahoe, and Territory of Colorado, of the first part, and Thomas Gaff and James W. Gaff, of Cincinnati, of the county of Hamilton, and State of Ohio, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of eighteen thousand dollars to the said party of the first part in hand
95 paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey, and confirm unto the said parties of the second part, their heirs and assigns forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following-described lots or parcels of land, situate, lying, and being in the county of Arapahoe, and Territory of Colorado, to wit: Lots number twenty-three, (23,) twenty-four, (24,) and twenty-five, (25,) in block number forty-six, (46;) and lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98;) all in the east division of the city of Denver:

[Canceled revenue stamp eighteen dollars.]

To have and to hold the same, together with all and singular the appurtenances and privile*d*ges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns forever. And the said party of the first part the aforesaid tracts or parcels of land and premises unto the said parties of the second part, their heirs and assigns, against the claim or claims of every person whatsoever, and the said McClure, doth and will warrant and forever defend by these presents, provided always, that these presents are upon the express condition that if the said McClure, his heirs, executors, or administrators, shall well and truly pay or cause to be paid unto the said Thomas Gaff and James W. Gaff, their heirs, executors, or *or* administrators or assigns, the sum of eighteen thousand dollars in manner particularly specified in three notes of six thousand dollars each, bearing even date herewith, executed by the said George W. McClure to the said Thomas Gaff and James W. Gaff, then and thenceforth these presents and everything herein contained shall cease and be void, *every*thing herein contained to the contrary notwithstanding. In wit-

ness whereof the said party of the first part has hereto set his
96 hand and seal the day and year first above written.

GEORGE W. McCLURE. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES E. McCLURE.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Charles G. Cheever, a notary public in and for said county, in the Territory aforesaid, do hereby certify that George W. McClure, who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this second day of February, A. D. 1867.

[SEAL.] CHARLES G. CHEEVER,
Notary Public.

(Indorsed:) 5900. Mortgage. George W. McClure to J. W. & F. Gaff

TERRITORY OF COLORADO,
County of Arapahoe:

I hereby certify that this deed was filed for record at 2¾ o'clock p. m., February 2d, 1867, and duly recorded in book 13, page 350.

CHARLES G. CHEEVER.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I hereby certify that this is a true and correct copy of the Exhibit F, attached to the master's report; that this copy is substituted instead of the original by order *by order* of court made and entered of record this July 3d, 1871.

Denver, July 6th, 1871.

GEORGE H. MILLS, *Clerk.*

TERRITORY OF COLORADO,
County of Arapahoe, ss:

97 In the district court of the first judicial district of the Territory of Colorado in *then* and for the county of Arapahoe, at the June term, A. D. 1870.

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. McCLURE. } In chancery.

This day comes the complainants, Thomas Gaff and James W. Gaff, by Charles and Elbert, their solicitors, and the defendant also comes, by Samuel E. Browne, his solictor, and this cause coming on to be heard upon the bill of complaint, the answer and replication, together with the notes, exhibits, and mortgages, and the report of the master in chancery herein, and the proofs in said report contained, and the court being fully advised in the premises, the said master's report is hereby approved and confirmed, and the court doth find that the allegations in said bill contained are true as therein stated, and that the equity of the cause is

with the complainants, and that there is due to them, on the first day of July, 1870, upon the said notes and mortgages in this bill *bill* of complaint mentioned, the sum of sixty-nine thousand and sixty-six ($69,066) dollars; it is therefore ordered, adjudged, and decreed by the court that the defendant, within thirty days from this day, pay to the complainants the said sum of sixty-nine thousand and sixty-six ($69,066) dollars with interest to be computed thereon from this day until paid, and also the costs of this suit to be taxed by the clerk of this court; and it is further ordered, adjudged, and decreed that, in default of said payment being made as aforesaid, *being made* by the said defendant, then, and in that case, that all and singular the said mortgaged premises mentioned in said bill of complaint in this cause, to wit, lots numbers twenty-three, (23,) twenty-four, (24,) and twenty-five, (25,) in block number forty-six, (46;) and lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98,) all situated in the east
98 division of the city of Denver, in the county of Arapahoe, and Territory of Colorado, or so much thereof as may be sufficient to realize the amount due the complainants, principal and interest, over and above the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold for cash in hand at public vendue to the highest and best bidder by Henry W. Hubbard, esq., who is hereby appointed special master in chancery for that purpose, at the door of the court in said county, between the hours of nine o'clock a. m. in the morning and the sitting of the sun of the same day; that the said master give public notice of the time and place of said sale by previously publishing the same for the space of twenty days in a public newspaper published in said county, and that the complainant' or either of them, or any of the parties in this cause, may become the purchaser or purchasers; that the said master, on the sale of said mortgaged premises, execute a certificate of purchase to the purchaser or purchasers therefor, which certificate shall specify the lands or tenements purchased, and the sum paid therefor, or, if purchased by the complainants in said bill, the amount of their bid, and the time when the purchaser will be entitled to a deed for such lands and tenements, unless the same shall be redeemed according to law; and the said master shall also file in the office of the recorder of said county a duplicate of said certificate signed by him, and that the said master, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and that he pay to the officers of this court their costs in this suit, and that out of the remainder of said proceeds he pay to the said complainant the amount of sixty-nine thousand and sixty-six dollars ($69,066.00) reported due as aforesaid, together with the legal interest thereon from the first day of July, A. D. 1870, until the day of said sale, or if such remainder shall be insufficient to pay the whole of said amount and interest as aforesaid,
99 then that he apply such remainder to the extent to which it will reach in satisfaction of said amount and interest, and that the said master take receipts from the respective parties to whom he may have made payments as aforesaid, and file the same together with his report of said sale in this court; and that in case said premises should sell for more than sufficient to pay the principal, interest, and costs in this suit, then that said master, after making payment as aforesaid, bring such surplus moneys into court without delay to abide the further decree thereof; and it is further ordered, adjudged, and decreed that the said defendant and his heirs, executors, administrators, and grantees, be forever barred and foreclosed from all equity of redemption and claim of, in,

and to said mortgaged premises, and any part and parcel thereof if the same are not by said defendant or his heirs, executors, administrators, or grantees redeemed according to law within six months from the day of said sale; and that all judgment-creditors whose judgments were obtained, since the commencement of this suit, if any there be, and parties claiming under them, be forever barred and foreclosed from all equity of redemption, and claim of, in, and to said mortgaged premises, and any part or parcel thereof, if the same are not by said judgment-creditors, or their representatives, redeemed according to law within nine months next after the day of said sale; and that at the expiration of the time of the said nine months if said lands are not redeemed as aforesaid, then and in that case, upon the production to the said Henry W. Hubbard, esq., or to the then acting master in chancery, and filing in his office of the certificate of purchase executed by the master in chancery as aforesaid, to the purchaser or purchasers of said mortgaged premises, by such purchaser or purchasers, their representatives or assigns, said special master or said acting master shall make, execute, and deliver to said purchaser or purchasers or his *or his* or their representatives or assigns, a good and sufficient conveyance in fee-simple of such prem-
100 ises, or such part thereof as shall have been sold; and it is further ordered that the said special master in chancery report his proceedings in the premsies to the court at the next term thereof, to which time this cause is hereby continued by the court.

July 1st, 1870.

C. S. EYSTER, *Judge.*

(Endorsed:) In chancery. Thomas Gaff et al. vs. George W. McClure. Decree filed July 1st, 1870. Oliver C. Whitemore, clerk. Charles & Elbert, solicitors for complainant.

After which the defendant, further to maintain the issues in this cause on his part, offered to read in evidence register in bankruptcy's certificate of the appointment of John Meckling, assignee in bankruptcy of the estate of George W. McClure, and *and* the assignment to the said Meckling, filed in the district court of Arapahœ County, in said cause of Gaff et al. against McClure, filed June 30th, A. D. 1870.

To the introduction of which in evidence and the reading the same in said cause the plaintiffs, by their counsel, then and there objected:

First. Because it does not appear to be filed by authority attorney, and is not entitled in said chancery suit.

Which objections were then and there overruled by the court, and the paper was allowed to be read in evidence.

To which ruling of the court the plaintiffs, by their counsel, then and there excepted, and an exception was then and there allowed to them, and the paper was read, of which the following is a copy:

IN THE MATTER OF GEORGE W. MCCLURE, BANKRUPT. } In bankruptcy.

In the supreme court of Colorado Territory.

101 I do hereby certify that, on the 9th day of May, A. D. 1870, the said George W. McClure was adjudged a bankrupt on his own petition, and I do further certify that in pursuance or the act of Congress entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867, I appointed John Meck-

ling assignee of the said bankrupt, at the first meeting of creditors, held before me, June 9th, 1870, at my office in said district.

S. E. BROWNE,
Register in Bankruptcy.

(Indorsed:) 1564. Gaff et al. vs. McClure. Certificate of bankruptcy, filed June 30th, 1870. Oliver A. Whitemore, clerk.

And the defendant then rested.

After which the plaintiffs, further to maintain the issues in the said cause on their part, offered to read in evidence to the court the certificate of the sale of the master of these premises to the plaintiffs. Also the report of the master of his sale of these premises to the plaintiffs, and the confirmation of the same by the court, and also the deed of the master for the premises in question to the plaintiffs for the purpose of showing the final conclusion of the chancery proceedings given in evidence by the defendant, and title in the plaintiffs.

To the introduction in evidence and the reading of any or all of the said papers, the defendant, by his counsel, then and there objected, first, that they or any of them were not rebutting of anything the defendant had offered in evidence; second, that they were not relevant.

EXCEPTION.—Which objections were then and there overruled by the court and the papers allowed to be read in evidence. To which ruling of the court the defendant then and there excepted, and an exception was allowed to him, and the papers were read in evidence.

102 And the plaintiff rested and the cause was submitted to the judge as aforesaid on the said evidence.

Master's report of sale.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE.

To the honorable Christian S. Eyster, judge of the district court of the first judicial district of the Territory of Colorado within and for the county of Arapahoe, presiding in chancery, at the June term:

In pursuance and by virtue of a decree of this court made in the above cause, dated the first day of July, in the year of our Lord one thousand eight hundred and seventy——, by which it was, among other things, ordered, adjudged, and decreed that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, be sold for cash in hand at public vendue to the highest and best bidder, by Henry W. Hubbard, esq., who was thereby appointed special master in chancery for that purpose, at the door of the court-house in said county, between the hours of nine in the morning and the setting of the sun of the same day; that the said master give public notice of the time and place of said sale by previously publishing the same for the space of twenty days in a public newspaper, published in said county; and that the said complainants, or either of them, or any of the parties in this cause may become the purchaser or purchasers; that the said master on the sale of said mortgaged premises execute a certificate

of purchase to the purchaser or purchasers thereof; and also file in the office of the recorder of said county a duplicate of said certificate signed by him; and that the said master, out of the proceeds of said
103 sale, retain his fees, disbursements, and commissions on said sale, and that he pay to the officers of this court their costs in this suit, and that out of the remainder of the said proceeds he pay to the said complainants the amount of sixty-nine thousand and sixty-six ($69,066) dollars, so reported due as aforesaid, together with legal interest thereon from the first day of July, A. D. 1870, until the day of said sale; or if such remainder shall be insufficient to pay the whole of said amount and interest as aforesaid, then that he apply said remainder to the extent to which it may reach in satisfaction of said amount and interest, I, the subscriber, a special master in chancery of this court, residing in the county of Arapahoe, respectfully certify and report that, having been charged by the judge of this court with the execution of said decree, I advertised said premises to be sold by me at public vendue to the highest and best bidder for cash in hand, in front of the building wherein is now held this court for said county, on Saturday, the twenty-seventh day of August, A. D. 1870, at ten a. m., by previously publishing the same for at least twenty days next immediately preceeding said sale in the Daily Rocky Mountain News, a public newspaper printed in said county of Arapahoe, which notice of sale contained a description of the said mortgaged premises, and is hereby attached marked "Exhibit A;" and I do further report that on Saturday, the twenty-seventh day of August, A. D. 1870, at ten o'clock a. m., the day on which the premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale and exposed said premises for sale at public vendue to the highest and best bidder, and the said premises were then and there fairly struck off to Thomas Gaff and James W. Gaff, the complainants mentioned in said decree, at the aggregate sum of fifty-nine thousand ($59,000.00) dollars, as follows, to wit: Thomas Gaff and James W. Gaff having bid fifteen thousand dollars ($15,000.00) for lots twenty-three, (23,) in block forty-six, east division of the city of Denver, that being the highest bid at said sale for said lot, said lot was
104 then and there struck off and sold to them; and Thomas Gaff and James W. Gaff having bid fifteen thousand ($15,000.00) dollars for lot twenty-four, (24,) in block forty-six, (46,) east division of the city of Denver, that being the highest bid at said sale for said lot, said lot was then and there struck off and sold to them; and Thomas Gaff and James W. Gaff having bid fifteen thousand ($15,000) dollars for lot twenty-five, (25,) in block forty-six, (46,) east division of the city of Denver, and that being the highest bid at said sale for said lot, said lot was then and there struck off and sold to them; and Thomas Gaff and James W. Gaff having bid fourteen thousand ($14,000.00) dollars for lots one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block ninety-eight, (98,) east division of the city of Denver, (said lots having been previously offered for sale by me, and no bidders offering to bid on the same, were then offered in mass,) and that being the highest bid at said sale for said lots, said lots were then and there sold to them; and I do further certify and report that I have executed the usual certificate of *of* purchase to the purchasers aforesaid and filed a duplicate thereof in the recorder's office in accordance with said decree, and have paid over, on behalf of the complainants, the following amounts: To Oliver A. Whitemore, the sum of twenty dollars and eighty cents, ($20.80,) in full for clerk's fees in this case; to David J. Cook, three dollars and eighty cents, ($3.80,) in full for sheriff's fees in this case; to Byers &

Dailey, nine dollars, ($9.00,) in full as printer's fees for publishing notice of sale, and have taken their respective receipts for the same, which are hereto attached and made a part of this my report; to Oliver A. Whitemore, twenty-five dollars ($25.00) for John W. Webster, in full payment of his fees as one of the masters in chancery; to myself, one hundred and eleven dollars and seventy-five cents, ($111.75,) the amount of my fees, commissions, and disbursements on said sale, as will appear by reference to the statement of the items annexed to the report,
105 and to which I refer; and I do further report that the decree in this cause be credited with the sum of fifty-eight thousand eight hundred and twenty-nine dollars and sixty-five cents, ($58,829.65,) the same being the amount bid as aforesaid, after deducting the costs paid as aforesaid; and I do further report that the interest on sixty-nine thousand and sixty-six dollars, ($69,066,) the amount mentioned in said decree, from July first, 1870, to August 27th, 1870, at the legal rate, is one thousand and seventy-four dollars and thirty-six cents, ($1,076.34); and I do further report that there is still due (August the 27th, 1870) the said commplainants the sum of eleven thousand three hundred and ten dollars and seventy-one cents ($11,310.71) on the original decree in said cause; and I do further certify and report that the premises so sold and conveyed as aforesaid were described in said decree and in the certificate of purchase so executed by me as aforesaid, as follows, to wit: Lots twenty-three, (23,) twenty-four, (24,) and twenty-five, (25,) in block forty-six, (46;) and lots one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block ninety-eight (98)—all situate in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado. All of which is respectfully submitted.

HENRY W. HUBBARD.

Dated September 19th, 1870.

Statement of master's fees, commissions, and disbursements on the sale referred to in the preceeding report, and other costs, and all other costs not therein included.

Duplicate certificate of purchase, 2 each	4 00
Recorder's fees for certificate	2 50
Revenue-stamp	25
Amount of commissions paid special master	100 00
Report of sale	5 00
	$111 75

106 *Master's report of sale.*

SYNOPSIS.

Amount of decree		69,066 00
Interest on the same from July 1st, 1870, to Aug. 27th, 1870		1,074 36
		70,140 36
Amount bid	59,000 00	
Paid as costs	170 35	
Credited on decree		58,829 65
Balance due Aug. 27th, 1870		11,310 71

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE. } In chancery.

DENVER, COLORADO, *Sept.* 19*th*, 1870.

Recd. of Mr. Hubbard, a special, master in chancery, who made the sale of the property in the above case, twenty $\frac{80}{100}$ dollars, in full for clerk's fees.

OLIVER A. WHITTEMORE.

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE. } In chancery.

DENVER, COLORADO, *Sept.* 19*th*, 1870.

Rece'd of H. W. Hubbard, a special master in chancery, who made the sale of the property in the above case, nine dollars, in full for printing notice of sale.

BYERS & DAILEY.

107 THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE. } In chancery.

DENVER, COLORADO, *September* 19*th*, 1870.

Rec'd of H. W. Hubbard twenty-five dollars as fees for John W. Webster, master in chancery.

OLIVER A. WHITTEMORE.

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE. } In chancery.

DENVER, *Sept.* 19*th*, 1870.

Received of H. W. Hubbard, a special master in chancery, who made the sale in the above case, three $\frac{80}{100}$ dollars, in full for sheriff's fees.

DAVID J. COOK, *Sheriff.*

Certificate of publication.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, John L. Dailey, of said county of Arapahoe, do hereby certify that I am one of the publishers and proprietors of the daily Rocky Mountain News, a daily newspaper printed and published in Denver, in said county and Territory, and I further certify that the notice of which the annexed is a true copy has been published in said newspaper for three successive weeks, and twenty-one times, and that the first publication of said notice was in said paper bearing date the 6th day of August, A. D. 1870, and the last publication of said notice was in said paper bearing date the twenty-seventh (27th) day of August, A. D. 1870.

In witness whereof I have hereunto set my hand this 19th day
108 of September, 1870.

JOHN L. DAILEY.

Foreclosure of mortgage.

THOMAS GAFF AND JAMES W. GAFF
vs.
GEORGE W. MCCLURE.

By virtue of a decree of the district court of the first judicial district of the Territory of Colorado, within and for the county of Arapahoe, in chancery, made and entered of record in the above case at June term, A. D. 1870, I, the subscriber, will sell at public vendue, to the highest and best bidder, for cash in hand, in front of the building wherein is now held this court of the said county, on Saturday, the 27th day of August, A. D. 1870, at 10 o'clock a. m., the following described lots or parcels of land, to wit: lots number twenty-three, (23,) twenty-four, (24,) and twenty five, (25,) in block forty-six, (46,) and lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98,) all situated in the east division of the city of Denver, in the county of Arapahoe and Territory of Colorado.

HENRY W. HUBBARD,
Special Master in Chancery.

CHARLES & ELBERT,
Solicitors for Complainants.

Report of special master in chancery. Thomas Gaff and James W. Gaff vs. George W. McClure. Filed and approved and confirmed this 27th day of October, A. D. 1870. By the court. C. S. Eyster, judge. One A., Aug. 6th, D. E. W. Filed Oct. 27th, A. D. 1870. Oliver A. Whit'emore, clerk.

It is admitted that the foregoing report and the deed following were both presented to the court in due time and by the court confirmed.

109 *Master's deed.*

[Int. rev. stamp, $60.00, cancelled.]

This indenture, made the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and seventy-one, between Henry W. Hubbard, a special master in chancery of the district court of the first judicial district of Colorado Territory, within and for the county of Arapahoe, of the first part, and Thomas Gaff and James W. Gaff, of the second part.

Whereas, at a court of chancery held for said district in the city of Denver, in said county, on the first day of July, in the year of our Lord one thousand eight hundred and seventy, it was ordered, adjudged, and decreed, by the said court, in a certain case then pending in the said court, between Thomas Gaff and James W. Gaff, complainants, and George W. McClure, defendant, that all and singular the mortgaged premises mentioned in the bill of complaint in said case, or so much thereof as may be sufficient to realize the amount due the complainants, principal and interest, over and above the costs of this suit, and which may be sold separately, without material injury to the parties interested, be sold for cash in hand at public vendue, to the highest and best bidder, by Henry H. Hubbard, esq., who was thereby appointed special master in chancery for that purpose, at the door of the court-house in said county, between the hours of nine in the morning and the setting of the sun of the same day; that the said master give public notice of

the time and place of said sale by previously publishing the same for the space of twenty days in a public newspaper published in said county, and that the said complainants, or either of them, or any of the parties in this cause, may become the purchaser or purchasers; and whereas the said Henry W. Hubbard, special master in chancery, and party of the first part to these presents, in pursuance of the decree of the said court of chancery, did, on the twenty-seventh day of August, A. D. 1870, sell at public vendue, in the county aforesaid,
110 the said mortgaged premises hereinafter particularly described, having first given public notice of the time and place of said sale, with a description of said mortgaged premises, as required by the decree aforesaid, at which sale the premises were stricken of' to Thomas Gaff and James W. Gaff for the sum of fifty-nine thousand dollars ($59,000.00,) that being the highest sum bid for the same, and certificates of purchase were issued to the said Thomas Gaff and James W. Gaff, in accordance with said decree, now, therefore, this indenture witnesseth that the said Henry W. Hubbard, special master in chancery, as aforesaid, and the party of the first part to these presents, in order to carry into effect the said sale so made, as aforesaid, in pursuance of the said decree, and also by virtue of the statute in such cases made and provided, and the time for redemption by the defendant, and all judgment-creditors having fully elapsed, and in consideration of the premises and the sum of fifty-nine thousand dollars bid at said sale, and the sum of one dollar in hand paid by the said party of the second part to these presents, to the same Henry W. Hubbard, special master in chancery, as aforesaid, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, alien, release, convey, and confirm unto the said party of the second part, and to their heirs and assigns forever, the following-described real estate, situate, lying, and being in the county of Arapahoe and Territory of Colorado, to wit: Lots number twenty-three, (23,) twenty-four, (24,) and twenty-five, (25,) in block number forty-six, and lots number one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block number ninety-eight, (98,) all situate in the east division of the city of Denver, in said county of Arapahoe and Territory of Colorado, together with all and singular the rights, titles, members, privileges, hereditaments, and appurtenances thereunto belonging or in any wise appertaining thereto, to have and to
111 hold the said premises above described, and thereby intended to be granted and conveyed unto the party of the second part, his heirs and assigns, to his and *and* their only proper use, benefit, and behoof, forever. In witness whereof, the said party of the first part, special master in chancery, as aforesaid, has hereunto set his hand and seal the day and year first above written.

HENRY W. HUBBARD, [SEAL.]
Special Master in Chancery.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

On this twenty-ninth day of May, A. D. 1871, before me personally came Henry W. Hubbard, special master in chancery, who is personally known to me to be the person described in and who executed this indenture, and acknowledges that he executed the same, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this twenty-ninth day of May, A. D. 1871.

[SEAL.] GEORGE H. MILLS,
Clerk District Court.

(On the back of which is indorsed:) Deed.—George W. McClure, by Henry W. Hubbard, esq., special master in chancery, to T. and J. W. Gaff. Filed for record May 29th, 1871, at 10 o'clock a. m., and recorded in book 30, page 503. W. D. Anthony, recorder; $2.25 p'd.

And thereupon the said judge then and there found the issues joined therein for the plaintiffs, to which finding the said defendant then and there excepted, but the court gave judgment upon the said finding of the said court against the defendant, to which the defendant then and there excepted and prayed an appeal, which appeal was allowed
112 to him; and inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and made part of the record in said cause, and it is done accordingly.

E. T. WELLS, *Judge.* [SEAL.]

The foregoing bill of exceptions was tendered to me March 6th, A. D. 1872.

E. T. WELLS.

Appeal-bond.

Know all men by these presents that we, Christian S. Eyster and James McFadden, of the county of Arapahoe, in the Territory of Colorado, are held and firmly bound unto Thomas Gaff and James Gaff in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents. Witness our hands and seals this twenty-third day of January, A. D. 1872.

The condition of the above obligation is such, that whereas the said Thomas Gaff and James Gaff, plaintiffs, did, on the twentieth day of January, 1872, in the district court of the first judicial district of the Territory of Colorado, in and for the county of Arapahoe, at the January term, A. D. 1872, thereof, recover a judgment against the above-bounden Christian S. Eyster, defendant in an action of ejectment, that the said plaintiffs do have and recover possession of the said premises, to wit: lots number one, two, three, four, five, and six, in block number ninety-eight, in the east division of the city of Denver, in the county of Arapahoe, and Territory of Colorado, in fee-simple; and that they have a writ of possession therefor, according to the form of the statute in such cases made and provided; and that they also recover their costs by them in
113 and about this said suit in this behalf laid out and expended, taxed at , and have execution therefor, from which judgment the said Christian S. Eyster has taken an appeal to the supreme court of the Territory of Colorado: Now, if the above-bounden Christian S. Eyster shall duly prosecute his appeal, and shall deliver up the said property to the plaintiffs, and pay and satisfy the said *the said* judgment, and the costs, interest, and damages, in case the said judgment shall be affirmed, then this obligation to be void; otherwise to be and remain in full force and virtue.

CHRISTIAN S. EYSTER. [SEAL.]
JAMES A. McFADDEN. [SEAL.]

TERRITORY OF COLORADO,
County of Arapahoe, ss:

James A. McFadden, being duly sworn, on oath deposes and says, that he is worth the sum of five hundred dollars, over and above his just debts and liabilities; and that he is the owner of property liable to execution and attachment in the Territory of Colorado to the value of five hundred dollars.

JAMES A. McFADDEN.

Subscribed and sworn to before me this 23d day of January, A. D. 1872.
GEORGE H. MILLS, *Clerk.*

(Indorsed:) 1970. Thomas Gaff & J. W. Gaff vs. C. S. Eyster. Filed and approved this 23d day of January, A. D. 1872. George H. Mills, clerk.

TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado Territory.

C. S. EYSTER, APPELLANT, *vs.* THOS. GAFF ET AL., APPELLEE. } Appeal from the judgment of the district court of Arapahoe County. In ejectment.

Assignment of errors.

114 First. The court below erred in admitting the record of the certificate of the entry of the town-site of the city of Denver to be read in evidence. An attested copy, or exemplification of the record, is the proper evidence, and not the original record.

Second. The court below erred in permitting Judge Clough to answer the following question against the objection of the defendant below, to wit: "Do you know whether that is or not the general and ordinary form of filings in that office?"

Third. The court below erred in permitting the paper mark' "A" to be read in evidence. It purports to be, and is called, a filing by McClure, in compliance with (as is alleged) the fourth section of the act of the legislature of Colorado, of the 11th of March, 1864. The plaintiffs below having shown by Judge Clough that that was the only paper on file by McClure, or any one for him, in the probate court, in refference to the lots in question, it was not a compliance with the act of the Legislature, not in conformity with it; it did not show the specific right, interest, or estate therein which he claimed, and was not, therefore, evidence proper in the cause.

Fourth. The court below erred in admitting to be read in evidence the deed from James Hall, probate judge of Arapahoe County, to George W. McClure, dated August 11, 1865. It is not in any respect in conformity with the act of the legislature of Colorado, entitled "An act prescribing rules and regulations for the execution of the trust arising under the act of Congress," entitled "An act for the relief of citizens of towns upon lands of the United States under certain circumstances." It does not show on its face, nor was it shown aliunde, that there had been, on the part of McClure or the probate judge, any conformity or regard to the rules and regulations alluded to in the act of
115 Congress and prescribed by the legislature. But, on the contrary, it professes to have been made under and by virtue of an

act of Congress. It is, under the act of Congress, void and of no effect, and should not, therefore, have been given in evidence.

Fifth. The court below erred in finding from the evidence in the cause that the plaintiffs were entitled to the premises in the said plaintiffs' declaration mentioned, to wit: lots number one, two, three, four, five, and six, in block number ninety-eight, in the east division of the city of Denver, in the county of Arapahoe and Territory of Colorado, in fee-simple; in this, that the evidence in the cause does not show any such estate in George W. McClure, the plaintiffs, alleged grantor.

Sixth. The court below erred in entering judgment on the said finding that the said plaintiffs do have and recover possession of the said premises, to wit: lots number one, two, three, four, five, and six, in block number ninety-eight, in the east division of the city of Denver, in the county of Arapahoe and Territory of Colorado, in fee-simple, and that they have a writ of possession therefor, according to the form of the statute in such cases made and provided, and that they also recover their costs by them in and about this suit by them in that behalf paid, laid out, and expended, taxed at dollars, and have execution therefor; in this, that the finding of the judge of the said court was erroneous, not warranted by the evidence, but was contrary to law and the evidence in the cause, and for divers other good and sufficient reasons.

Seventh. The court below erred in admitting the mortgage of George W. McClure to the plaintiffs in evidence, unaccompanied by any proof of the debt which it was given to secure. It was not competent evi-
116 dence to support an action of ejectment; and it was merged and extinguished in the decree of the district court of Arapahoe County, of the 1st of July, A. D. 1870, afterwards offered in evidence.

Eighth. The court below erred in admitting in evidence the certificate of the master's sale, of the 27th of August, A. D. 1870; also the report of the master of the sale of the premises, and the confirmation of the same by the court on the 7th of October, A. D. 1870, and the master's deed of the premises in question to the plaintiffs, dated the 29th of May, A. D. 1871. They were not rebutting of anything the defendant had offered in evidence. They were not relevant to the issues. The plaintiffs declare that they were possessed of the premises on the first day of October, 1869, and they had no right to give in evidence a title acquired subsequent to that date. George W. McClure, under whom they claim, was adjudged and decreed a bankrupt on the 10th of May, A. D. 1870, and discharged on the 28th of December, A. D. 1870, and the decree and the sale of the premises in question were made pending these proceedings in bankruptcy, and without the leave or permission of the bankrupt court, and were therefore void. The property in question was, at the time of the decree and sale, in the custody of the bankrupt court, and the district court had no jurisdiction to order and make such sale.

Ninth. The judge to whom the cause was submitted for trial, erred in finding the issue joined in the cause for the plaintiffs.

Tenth. The judge to whom the trial of the issues joined in this case was submitted, erred in finding from all the evidence in the cause that the plaintiffs were entitled to the premises in the said plaintiff's declaration mentioned, in fee-simple, to wit: lots number one, two, three, four, five, and six, in block number ninety-eight, in the east division of the city of Denver, in the county of Arapahoe and Territory of
117 Colorado. The mortgage of McClure to the plaintiffs, read in evi-

dence, was merged and extinguished by the decree of the district court of Arapahoe County, of the first of July, 1870. The plaintiffs, by taking that decree, pending the proceedings in bankruptcy in the supreme court of Colorado Territory, in the matter of George W. McClure, bankrupt, and without the consent of the bankrupt court, made the debt for which the decree was given a personal debt against the after-acquired property of George W. McClure, and released, relinquished, and extinguished their lien under and by virtue of the mortgage. The district court had jurisdiction to enter the decree for the money, but no jurisdiction to order a sale of the premises.

Eleventh. The court below erred in entering the judgment on the finding of the judge. There was no evidence in the cause to justify such finding, and the finding being erroneous, the judgment entered upon it must be error.

Thirteenth. The finding of the judge for the plaintiffs was erroneous in this: The mortgage on which the plaintiffs claimed title was utterly extinguished in the decree and sale in chancery, and the master's deed offered in evidence showed a title acquired after the day, to wit, in the declaration.

Twelfth. General errors.

C. S. EYSTER,
M. M. BENEDICT,
Attys. for Appellant.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

118 I, George H. Mills, clerk of the district court of the first judicial district of the Territory of Colorado, and within and for the county of Arapahoe aforesaid, do hereby certify that the above and foregoing is a true transcript of—

1st. The summons and the sheriff's return thereon,
2d. The declaration,
3d. The plea of defendant,
4th. The finding of the court and order of judgment,
5th. The bill of exceptions,
6th. The appeal-bond, filed and entered of record in said court in the above-entitled cause, as the same appear from the records and files of said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Denver, in said county, this 4th day of February, A. D. 1873.

[SEAL.] GEORGE H. MILLS, *Clerk.*

Fees, 251 folios, @ 20 c.	$50 20
Certif. & seal	1
	51 20

Paid by C. S. Eyster, esq.

(Indorsed:) 79. Christian S. Eyster, appellant, vs. Thomas Gaff et al., appellees. Record. Filed Feb. 10, 1873. David W. Crater, clerk.

119 And afterwards, to wit, on the fifteenth day of February, A. D. 1873, there was filed in the office of the clerk of said supreme court a joinder in error, which said joinder in error is in the words and figures following, to wit:

Joinder in error.

In the supreme court of Colorado Territory, of the February term thereof, A. D. 1873.

THOMAS GAFF AND J. W. GAFF, APPELLEES,
ats.
CHRISTIAN S. EYSTER, APPELLANT. } Joinder in error.

And the said Thomas Gaff and J. W. Gaff, appellees, by Charles & Elbert, their attorneys, come and say that there is no error, either in the record and proceedings aforesaid, or in giving judgment aforesaid, in manner and form as above assigned; and therefore he prays that the said judgment may be affirmed, and that their costs may be adjudged to them, &c.

CHARLES & ELBERT,
Attys. for Appellees.

(Indorsed:) 79. C. S. Eyster vs. Thomas Gaff et al. Joinder in error. Filed February 15, 1873. David W. Crater, clerk. Charles & Elbert, for appellees.

And afterwards, to wit, on the day and year last aforesaid, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—present, Hon. Moses Hallett, chief-justice, Hon. James B. Belford and Hon Ebenezer T. Wells, associate
120 justices, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—the following proceedings were had and entered of record in said cause in said court, to wit:

CHRISTIAN S. EYSTER, APPELLANT,
vs.
THOMAS GAFF AND J. W. GAFF, APPELLEES. } No. 79. Appeal from district court, Arapahoe County.

At this day come the said parties, Christian S. Eyster per se, and Charles and Elbert, for the said appellees, and this cause come on to be heard; and the said appellees, by his said attorneys, suggests defects in the transcript of record filed in this cause, in this: That it fails to show on what day the judgment was rendered, and on what day the narr was filed, and reserves the right to have the record corrected in this regard. Whereupon, it is ordered by the court that this cause be set for hearing on Thursday, the twentieth day of February next ensuing this day.

And afterwards, to wit, on the twentieth day of February, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—present, Hon. Moses Hallett, chief-justice, Hon. James R. Belford and Hon. Ebenezer T. Wells, associate justices, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—the following proceedings were had and entered of record in said cause in said court, to wit:

121 CHRISTIAN S. EYSTER, APPELLANT,
vs.
THOMAS GAFF AND J. W. GAFF, APPELLEES. } No. 79. Appeal from district court, Arapahoe County.

At this day come the said parties, by their attorneys, Mitchell M.

Benedict and the said Christian L. Eyster pro se. for the said appellant, and Charles & Elbert and A. C. Phelps, esq., for the said appellees, and this cause come on to be heard; and the same is argued by counsel for the said parties until the hour of adjournment. And it is ordered that the further hearing of this cause be at the incoming of court on Friday, the twenty-first day of February next ensuing this day.

And afterwards, to wit, on the twenty-first day of February, A.D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—present, Hon. Moses Hallett, chief-justice, Hon. James B. Belford and Hon. Ebenezer T. Wells, associate justices, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—the following proceedings were had and entered of record in said cause in said court, to wit:

CHRISTIAN L. EYSTER, APPELLANT, *vs.* THOMAS GAFF AND J. W. GAFF, APPELLEES. } No. 79. Appeal from district court, Arapahoe County.

At this day come the said parties, by their attorneys, and this
122 cause come on for further hearing; and the same is argued by counsel for the said parties, and submitted to the consideration and judgment of the court. And judgment thereon is reserved until another day.

And afterwards, to wit, on the twenty-seventh day of March, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—present, Hon. Moses Hallett, chief-justice, Hon. James B. Belford and Hon. Ebenezer T. Wells, associate justices, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—the following proceedings were had and entered of record in said cause in said court, to wit:

CHRISTIAN S. EYSTER, APPELLANT, *vs.* THOMAS GAFF AND J. W. GAFF, APPELLEES. } Appeal from district court, Arapahoe county.

At this day come the said appellant pro se., and also come the said appellees, by Charles & Elbert and E. L. Smith, esq., his attorneys; and this cause having been heretofore argued by said parties, and submitted to the consideration and judgment of the court, at the present term thereof, and it appearing to the court that there is manifest error in the record and proceedings, and in the judgment of the said district court in this cause, it is therefore ordered by the court that the judgment of the said district court of Arapahoe County in this cause be, and the same is hereby, reversed; and this cause is remanded to the said district court for further proceedings according to law; that
123 the opinion of the court filed herein be recorded, and that the said appellant recover of and from the said appellees his costs and charges in this behalf expended, and that he have execution therefor.

And afterwards, to wit, on the day and year last aforesaid, there was filed in the office of the clerk of said supreme court a petition for rehearing, which said petition is in the words and figures following, to wit:

Petition for rehearing.

In the supreme court of the Territory of Colorado, of the February term thereof, A. D. 1873.

CHRISTIAN S. EYSTER, APPELLANT, *vs.* THOMAS & JAMES GAFF, APPELLEES. } Appeal from dist. court of Arapahoe County.

Petition for rehearing.

And now the said appellees, by their counsel, come and pray the court for a rehearing of the said above-entitled cause, because in the opinion rendered in said cause by said court, at this said term of said court, the court erred as follows, to wit:

I. In that the court held that, because in the chancery suit begun long before the filing of the petition in bankruptcy by McClure, the assignee, was not made party to the bill before decree rendered, therefore the decree is void, and this portion of said opinion is erroneous. 1st. Because the rights of the assignee in bankruptcy are not in controversy in the case now before this court. 2nd. Because the
124 said assignee never took the legal estate in said premises, but only an equity of redemption, and an equitable estate cannot be set up to defeat a recovery in ejectment. 3d. Because in the chancery case the complainants had neither the authority or privilege of interposing the defence of bankruptcy for the defendant, nor was it any part of their duty so to do; but the defendant could & should have set up the same, or the assignee, if he desired to be made a party, should have come in and asked the privilege, as authorized to do by sec. 14 of the bankrupt act; and, failing so to do, it is to be presumed that he defended either in the name of McClure, or else that he did not wish to defend. 4th. Because, where neither the bankrupt nor his assignee set up as a defence the matter of bankruptcy, and the cause proceeds to trial and judgment, the judgment or decree is valid. 5th. Because a decree of a court of general jurisdiction cannot be questioned in a collateral proceeding. 6th. Because the validity of the decree as to the assignee cannot be questioned in a collateral proceeding between other parties. 7th. Because the law and cases cited in support of this portion of said opinion are not applicable to the questions here involved upon the facts of the case, as the cases so cited are subsequently explained in the same courts in several instances, but there are authorities not cited by said court or referred to in said opinion which sustain the position herein above contended for. 8th. Because it appears from evidence in the record that the equity of redemption was worthless, the property being worth less than the mortgage-debt.

II. Because the court erred in holding that the ejectment suit could not be maintained without leave of the bankrupt court, and this portion of said opinion is erroneous. 1st. Because this ejectment suit was begun more than a year subsequent to the commencement of proceedings in bankruptcy, and there is nothing to show that the estate of the bankrupt
125 at the time of the beginning of the ejectment suit was not fully wound up and settled and the assignee discharged. 2d. Because it was optional with the bankrupt and assignee, or either of them, to interpose this objection or not, and not having done so, the presumption of law is that they elected not so to do. 3d. Because the bankrupt court could allow the suit to proceed if it deemed best, and, nothing to

the contrary appearing, such will be presumed to be the decision of the bankrupt court. 4th. Because it is not the duty or right of the plaintiff or the court to make this objection, but it is a matter for the defendant to set up and prove, which he has not done. 5th. Because the appellant, being a mere stranger, not pretending to claim under the bankrupt or his assignee, cannot interpose this objection, which is a mere equitable right of the bankrupt or his assignee, or a discretionary power vested in the bankrupt court, the legal estate being in the mortgagees, plaintiffs in the ejectment suit.

III. The court erred in assuming as a fact that the rights of the bankrupt or his assignee were involved in this case, and that appellant claimed under them, or one of them, when the same in no way appears from the record.

And therefore petitioners pray for a rehearing of said cause by the court.

By CHARLES & ELBERT,
E. L. SMITH & A. C. PHELPS,
Their Counsel.

(Indorsed:) 79. In the supreme court of the Territory of Colorado. Case No. . Christian S. Eyster vs. Thomas & James W. Gaff. Petition for rehearing. Filed March 27, 1873. David W. Crater, clerk.

126 And afterwards, to wit, on the twenty-seventh day of March, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory: Present, honorable Moses Hallett, chief justice, honorable James B. Belford, and honorable Ebenezer T. Wells, associate justices, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court.

The following proceedings were had and entered of record in said cause in said court, to wit:

CHRISTIAN S. EYSTER, APPELLANT, *vs.* THOMAS GAFF AND J. W. GAFF, APPELLEES. } No. 79. In the matter of the petition for rehearing of appeal from district court Arapahoe County.

At this day come the said appellees, by Charles & Elbert, and E. L. Smith, esq., their attorneys, and file their petition herein, praying for a rehearing of the above-entitled cause, and upon the petition it appearing to the court that, in the judgment lately and upon this same day in this court in this behalf given, whereby it was considered that the judgment aforesaid of the said district court be reversed and for naught held, there is probable error; therefore it is considered by the court that the judgment aforesaid by the court here in this behalf given be set aside, and from henceforth for naught held. And it is further ordered by the court that this cause stand for further argument of the errors by the said appellant assigned, and that the said appellees file their written arguments herein on or before the first day of May next ensuing this day; and that the said appellant file his written answer thereto
127 on or before the fifteenth day of May next thereafter, and that the said appellee file his written reply to the answer of said appellant on or before the twenty-fifth day of May next ensuing the last aforementioned day.

And afterwards, to wit, on the first day of September, A. D. 1873,

there was filed in the office of the clerk of said supreme court of Colorado Territory a stipulation to amend the bill of exceptions, which said stipulation is in the words and figures following, to wit:

In the supreme court of Colorado Territory, of the February term thereof, A. D. 1873.

CHRISTIAN S. EYSTER, APPELLANT,
vs.
THOMAS GAFF ET AL., APPELLEES.

It is hereby stipulated, by and between the parties to the above-entitled cause, that the bill of exceptions in the said cause, and contained in the record of the same, is to be amended, and by virtue of this stipulation is amended, so as to show, in the recital of the testimony given by the appellees on the trial of the cause in the court below, that it was admitted on said trial that the defendant in said cause was in the possession of the property and premises described in the declaration in said cause at the time of the commencement of said suit and prior thereto; also, that said bill of exceptions is to be amended so as to correct any mistakes as to dates which may have been made in copying from any of the original papers and proceedings in the bankruptcy case of McClure, given in evidence by the appellant on the trial of the cause in the court below; and that, when so amended, it is further to be amended by inserting at the close of the testimony in said bill of exceptions the
128 words, "This was all the evidence offered given on the trial of said cause."

C. S. EYSTER,
Appellant.
THOMAS GAFF ET AL.,
By CHARLES & ELBERT,
For Appellees.

(Indorsed:) 79. C. S. Eyster vs. Thomas Gaff et al. Stipulation to amend the bill of exceptions. Filed Sept. 1st, 1873. David W. Crater, clerk.

And afterwards, to wit, on the sixth day of September, A. D. 1873, there was filed in the office of the clerk of the supreme court of Colorado Territory, a petition of John Mechling, assignee, to be made a party, which said petition is in the words and figures following, to wit:

TERRITORY OF COLORADO, *ss:*

In the supreme court of the Territory of Colorado, to the February term thereof, A. D. 187 .

CHRISTIAN S. EYSTER, APPELLANT,
vs.
THOMAS GAFF AND JAMES W. GAFF, APPELLEES. } Appeal.

To the honorable Moses Hallett, chief-justice, and James B. Belford and E. T. Wells, his associates, judges composing the said court.

The petition of John Meckling, of the Territory of Colorado,
129 would respectfully represent and show unto your honors, that an

inspection of the record in the above-entitled cause will show that it *it* is an appeal from the judgment of the district court of Arapahoe County in an action of ejectment brought in the district court of the first judicial district of the Territory of Colorado within and for the county of Arapahoe for the recovery of lots numbers 1, 2, 3, 4, 5, & 6 in block number in the east division of the city of Denver, in which said action Thomas Gaff and James W. Gaff were plaintiffs and Christian S. Eyster is defendant. Your petitioner would further represent and show unto your honors that an inspection of the record in this case will also show that the property in question was the property of one George W. McClure, of the city of Denver. That the said George W. McClure is a bankrupt, and that at the time he filed his petition in bankruptcy he made due and lawful return of the same property in his appropriate schedule.

Your petitioner would further represent and show unto your honors that he was duly appointed the assignee in bankruptcy of the said George W. McClure, and that the whole of the said property was duly made to your petitioner as such assignee in bankruptcy of the said George W. McClure, as will be seen by the accompanying certified copy of the same assignment and the records in this cause.

Wherefore and by reason of the premises your petitioner prays your honors that he as such assignee in bankruptcy of the said George W. McClure may be let in to defend in this suit and be made a party therein, as of right he may be, and he will ever pray, &c.

JOHN MECHLING, *Assignee.*

To M. M. BENEDICT, Esq.:

D'R SIR: You will please take charge of the within for me and make the appropriate motion, &c.

JOHN MECHLING.

130 (Indorsed:) 79. Eyster vs. Gaff et al. Petition of John Meckling, assignee, to be made a party. Filed Sept. 6, 1873. David W. Crater, clerk.

131 And afterwards, to wit, on the thirteenth day of September, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—present, Hon. Moses Hallett, chief-justice, and Hon. Ebenezer T. Wells, associate justice, M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—the following proceedings were had and entered of record in said cause in said court, to wit:

S T IAN S. EYSTER, APPELLANT, *vs.* GA FF AND J. W. GAFF, APPELLEES.	Appeal from district court Arapahoe County.

At this day came one John Mechling, (assignee of George W. McClure, a bankrupt,) and presents to the court his petition, and thereby moves the court for leave to become a party to the above-entitled cause, and the said motion having been argued by counsel and submitted to the consideration of the court at the present term thereof; and it appearing to the court that the estate in controversy was lately the property of said George W. McClure, from whom the plaintiff derived title, and who before the bringing of this action had been adjudged a bankrupt, and to whom petitioner had been appointed assignee; and inasmuch

as the petitioner was not a party to the suit in the court below, he should not be heard in this cause in this court. Therefore it is ordered by the court that the petition filed herein be denied, and that the opinion of the court filed herein be recorded.

132 And afterward, to wit, on the day last aforesaid, present as aforesaid, the following proceedings were had in said cause in said court, to wit:

CHRISTIAN S. EYSTER, APPELLANT,
vs.
THOMAS GAFF AND J. W. GAFF, APPELLEES. } Aappeal from district court Arapahoe County.

At this day come the said parties, by their attorneys, Christian S. Eyster pro se and M. Benedict, esq., for said appellant, Charles & Elbert and E. L. Smith, esq., for said appellees, and this cause having been heretofore argued by counsel for said parties and submitted to the consideration and judgment of the court at the present term thereof, and it appearing to the court that there is no error either in the record and proceedings nor in the judgment of the said district court in this cause, it is therefore ordered by the court that the judgment of the said district court of Arapahoe County in this cause be, and the same is hereby, affirmed and stand in full force and effect; that the opinions of the court filed herein be recorded, and that the said appellees recover of and from the said appellant their costs and charges in this behalf expended, and that they have execution therefor.

And afterwards, to wit, on the day and year last aforesaid, there was filed in the office of the clerk of said supreme court of Colorado Territory the opinion of the court, by Wells, J., upon the petition and motion of one John Mechling to be made a party to this suit, and also the opinion of the court, by Wells, J., in this cause, and the dissenting opinion of Belford, J., which said opinions respectively are in the words and figures following, to wit:

133 *Opinion of court, by Wells, J., upon the petition of John Mechling to be made a party to this suit.*

Supreme court, Feb'y term, '73.

EYSTER
vs.
GAFF ET AL.

Gaff and others brought ejectment against Eyster in the Arapahoe district court, and at April term, 1872, judgment was given in favor of the plaintiffs. An appeal was prayed by Eyster, and the cause being brought to issue in this court, was argued at the February term, A. D. 1873. Judgment being reserved, one John Mechling, at the September sitting of the court, presented his petition to be let in to defend in this court, assigning for ground of his petition that by the record it appears that the estate in controversy was lately the property of one George W. McClure, from whom the plaintiffs derive title, and who before the beginning of this action had been adjudged a bankrupt, and to whom petitioner had been appointed assignee. The petitioner also produced a certified copy of the assignment in bankruptcy executed to him by the register.

WELLS, J.:

The petition must be denied. The issues were made in the district court and tried there. The only questions to be considered in this court arise upon that record. To admit a new party party now, unless in substitution for a deceased person, or one adjudged a bankrupt since
134 the judgment below, or the like, would violate the rule that only parties and privies to judicial proceedings may assign error therein. Inasmuch as the assignee was not a party below he cannot be prejudiced by the judgment, and he ought not to be heard to question its regularity. If those interested in a litigation of this character desire to interfere therein, they should apply for permission to do so in seasonable time.

The case of Herndon vs. Howard, (9 Wall., 664,) which was relied on at the bar, seems not in point. In that case Herndon, who was defendant below, became a bankrupt after perfecting his appeal. His assignee was properly admitted in the supreme court. Here the bankruptcy occurred long before the action was brought, and the bankrupt never was a party.

Petition denied.

(Endorsed:) Eyster vs. Gaff et al. In re Mechling's petition. Opinion. Filed Sept. 13, 1873. David W. Crater, clerk.

135 *Opinion of court, by Wells, J.*

Supreme court, February term, 1873.

EYSTER *vs.* GAFF ET AL.

WELLS, J.:

Passing by all questions as to whether the assignee of McClure was or was not a necessary party to the bill to foreclose, and as to whether the decree given therein, after the bankruptcy, and without joining him, is or is not void, it appears to us that the appellees were properly permitted to recover in the court below upon their mortgage alone. This results necessarily, as we think, from the nature of the mortgagee's estate and the relation of the assignee thereto. The lien and estate of the mortgagee is preserved, notwithstanding the bankruptcy, and the assignee succeeds to the right which the mortgagor had before bankruptcy. If the assignee has, in person or by another, taken actual possession of the estate, the mortgagee cannot disturb that possession by an action brought after the initiation of the bankruptcy proceedings; in such case the possession of the assignee is the possession of the court in bankruptcy, and if the mortgagee would enter he must first obtain the permission of that court. But in many cases he is not entitled to such possession: e. g., when the estate assigned consists of realty subject to mortgage, and the mortgagee has entered before the bankruptcy. In such case the mortgagee unquestionably may retain the possession which he has lawfully acquired.

136 So there are other cases where, though technically entitled to the possession, he is not only not bound to assume it, but his duty to leave it where the bankruptcy finds it: e. g., where the estate assigned is subject to incumbrance exceeding its value. (Lambert's case, 2 B. R., 138.)

Therefore, where the estate is assigned subject to mortgage, it ought

not to be said, in any case, that, as matter of law nothing being shown as to the fact, the assignee has either the actual or constructive possession. And in the present case the appellant has not in any way connected himself with the assignee, nor shown even that the assignee has ever assumed or attempted to assume the possession of the premises.

If, as for *ought* that we know is the case, the assignee disclaims the estate, the plaintiffs certainly are entitled thereto, and they ought to be permitted to proceed against the defendant, who appears to be a mere stranger, in the ordinary courts, notwithstanding the bankruptcy.

The judgment of the district court is affirmed.

(Endorsed:) Eyster vs. Gaff et al. Opinion of Wells, J. Filed Sept. 13, 1873. David W. Crater, clerk.

137 *Dissenting opinion of Belford, J.*

In the supreme court, February term, 1873.

C. S. EYSTER, APPELLANT,
vs.
THOMAS GAFF ET ALS., APPELLEE.

BELFORD, J., dissenting:

When I have the misfortune to differ from this court, I would under ordinary circumstances silently acquiesce in its opinion. It is well known to the profession that this court unanimously voted to reverse this judgment at the last term. Since that time I find that my associates have changed ground. My convictions have, however, undergone no modification. They may be mistaken and unwarranted, but still they are sincerely entertained, and should not be abandoned simply because others have received a degree of judicial illumination which thus far has failed to enlighten my path; and, inasmuch as I think this cause cannot be maintained, I think it not improper to review at length the whole case. The first error assigned is the action of the court in admitting the filing made by McClure on the lots in controversy.

The second error goes to the introduction of the deed from Hall to McClure. I will consider these two assignments together. It appears from the bill of exceptions that McClure, the mortgagor, was in the possession of these lots from 1862 until 1868. The mortgage was executed while he was in such possession.

138 It is a well settled principle of law that a mortgagor will not be permitted to dispute a title derived under his mortgage, nor allege anything in opposition to a claim founded on it. By the mortgage he professes to convey, and thereby avers that he held, an estate in fee-simple. An ancient rule of the common law, founded on clear and immutable principles of justice, forbids a party from alleging, in contradiction of his own deed, or in opposition to a claim founded on such deed, that he was guilty of falsehood and had no estate or interest in the premises at the execution of the deed. Granting that the filing was defective and the deed not in conformity with the law, nothing is clearer than that McClure is estopped from availing himself of any defects which may exist in the instruments under and through which he derived his title. And while this is true of the mortgagor it is equally so of a person who enters as his tenant subsequent to the execution of the mortgage. (Addison vs. Crow, 5 Dana, 282; Den vs. Vanness, 5 Halstead, 102.)

It is equally well settled that in an action of ejectment for the recovery of mortgaged premises against the mortgagor, or one entering under him subsequent to the date of the mortgage, the plaintiff need not trace his title back of the mortgage. (Pillock vs. Maison, 41st Ill., 516.) On the trial below, the plaintiffs, after introducing the mortgage, rested their case, and the defendant, with a view to show that the mortgage was ineffectual, offered in evidence the decree of foreclosure and resisted the recovery on the mortgage on the ground that it was merged
139 and extinguished by the decree. In the courts when this question has arisen considerable conflict prevails. In the case of The People vs. Bebee, decided in 1847, and reported in 1st Barb., 379, it is held that a decree of a court of equity for the foreclosure of a mortgage extinguishes the lien of the mortgage; and it is further held that, after a sale of the mortgaged premises under the decree of foreclosure, neither the mortgage nor the decree is any longer a lien upon the premises. In the case of Butler vs. Miller, 1st Denio, 407, it was held that when a party having a note secured by a mortgage takes judgment on the note, that the judgment operates as a merger and extinguishment of the debt and mortgage. This same case coming before the court of appeals again, (1st Comstock, 500,) the court alludes to the previous decision and questions its soundness. They say that although it is clear that the notes were merged in the judgment by operation of law it does not certainly follow that the mortgage would be extinguished. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done the mortgage, whether upon real or personal property, should be allowed to stand. The rule that securities of a higher nature extinguish*es* inferior securities will be found to apply to the state or condition of the debt itself, and means no more than this: that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security, and that all securities by which such inferior
140 condition was evidenced lose their vitality. The court states: "It has never been applied, and never should be, to the extinguishment of distinct securities, whether superior or inferior in degree; these are to be cancelled by satisfaction of the debt or voluntary surrender alone." In Pennsylvania it has been repeatedly held that when a judgment is taken on a bond or note secured by a mortgage and the land sold under the judgment, the lien of the mortgage is destroyed. (West Branch Bank vs. Chester, 11 Penn. St., 282; Williard vs. Norris, 2 Rawle, 56; McCall vs. Lennox, 9 S. & R., 303; Cronister vs. Weise, 8 Walls., 215; Donley vs. Hays, 17 S. & R.; Clark vs. Stanley, 10 Barr, 497.) The decisions in Pennsylvania are made to rest on the ground that when a sale is on a judgment on the bond for which the mortgage was given, that the entire estate of inheritance was the subject of sale. The mortgage is regarded as a mere charge on the land. The estate in the land is the same thing as the money due upon it. A mortgage, though in form a conveyance of the land, is in substance but a security for the payment of the money, and the debt being paid, or in any other manner extinguished, the lien of the mortgage is gone. The transaction is regarded as nothing else in substance but a debt to which all securities are merely accidental adjuncts, and which have no existence but by their union with the subject to which they are attached. The equity of redemption is therefore not a mere trust, but in equity is the veritable estate, and when sold to satisfy the debt secured by the mort-

gage the purchaser takes the blended estates of the mortgagor and mortgagee.

141 In Kentucky it has been repeatedly decided that an execution on a judgment at law for a mortgage-debt cannot be levied on the equity of redemption of the mortgaged property, and that a sale of the equity under such an execution passes nothing to the purchaser; this of course does not apply to sales when made under judgments in favor of general creditors. (Gowing vs. Streve, 7 Dana, 65; Swigert vs. Thomas, 7 Dana, 220; Bronston vs. Robinson, 4 B. Monroe, 142; Waller vs. Tate, ib., 531.)

It is not a matter of question that a creditor who takes a mortgage to secure a debt by bond or otherwise has three remedies, either of which he is at liberty to pursue until his debt is satisfied. He may bring an action of debt upon the bond, or he may put himself in possession of the rents and profits of the land mortgaged by means of ejectment, or he may foreclose the equity of redemption and sell the land to satisfy the debt. I am clearly of the opinion, however, that a mere judgment on the bond in an action of debt is not a discharge of the lien of the mortgage, nor has a simple decree of foreclosure that effect; but when the mortgaged property has been sold under the decree to satisfy the debt, then if the decree is a valid one the mortgage has ceased to be available. By the sale of the mortgaged property that is accomplished which the mortgagor and mortgagee at the time of the execution of the mortgage intended, that the property should stand as

142 security for the debt, and if necessary be resorted to as a fixed security out of which to obtain payment. By such sale the land is converted into money and applied to the mortgaged debt, and the purchaser takes the title. If the proceeds amount to more than the debt the surplus goes to the mortgagor, and if they are insufficient to pay the debt the balance unpaid may be recovered from the mortgagor; and this is consistent with the contract, the rights, and interest of the parties. When the mortgagor becomes the purchaser at such sale two titles in the land become united in the same person, in the same right, and at the same time as mortgagor and mortgagee. The owner of the decree and mortgage is alike the owner of the land. The mortgage has served its purpose when the sale takes place, and can no longer be used as a foundation on which an action of ejectment can be permitted. While the lien of the mortgage is thus defeated by the sale it has been uniformly held that the title acquired by the sale is carried back by relation to the date of the execution of the mortgage. It has also been repeatedly decided that when mortgaged property is sold under decree of foreclosure and has failed to satisfy the debt, that the property in the hands of a purchaser under such sale is not liable to another exposure. (Ex-parte Stevens, 4th Carr, 133; Hewson vs. Drygert, 8 John., 257; Ridgeway vs. Longaker, 18 Penn. St., 217.)

It now becomes necessary to enquire whether the decree rendered in the foreclosure suit is a valid one. The proceedings to foreclose the mortgage were begun some eighteen months prior to McClure's discharge as a bankrupt. The decree, however, was not entered

143 until a considerable time afterwards. It is manifest from the provisions of the bankrupt act that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes eo instanti a bankrupt, so far as any inference with the property named in his inventory is concerned, and such property is brought into the bankruptcy court, and placed in its custody and under its protection. When the property rests in the hands of the assignee there is an impassable

chasm between the bankrupt and his estate; he has no further interest in or control over it. It is in the custody of the law for the benefit of his creditors. He is as absolutely dead to the estate as he would be if buried out of sight. At the time the decree was entered, the equity of redemption was out of McClure and in the hands of the assignee. Ordinarily speaking, when the interest of a defendant in the subject of the litigation becomes vested in others pendente lite without an actual abatement of the suit, a distinction is very properly made between the transfer of that interest by the mere voluntary act of the defendant, as in the case of a sale or assignment in the ordinary course of business, and a transfer of that interest by operation of law, as upon an assignment in bankruptcy or under insolvent laws. In the first case the complainant is not bound to make the assignee a party, but in the last case the assignee who has become such by operation of law has a right to be heard and must be made a party before the suit can be further prosecuted. (Cleveland vs. Sedgwick, 7th Paige, 290; Dens vs. Thorne et al., 3 John., 544; Springer vs. Vandepool, 4 Edwards, ch. 362; Lowry vs. Morrison, 11 Paige)
144 329; Story Eq. Pl., sec. 158; in re Frezelle, 5 N. B. R., 122. It could not be contended that a complainant after the death of the respondent could proceed to enter a decree affecting his property without making those parties on whom the estate was cast. Before another step could be taken, it would be necessary to revive the suit in the name of the administrator, or heirs, and this principle is equally applicable to the case at bar, inasmuch as the assignee stands in the same relation to the bankrupt that the administrators, or heirs, sustain to a decedent. Herndon vs. Howard, 9 Wall., 664; Lacy vs. Rickett, 11 Ala., 1002; Swepson vs. Rouse, 6 Am. Rep., 736. It is the constant rule of courts of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject-matter of the suit so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented; and hence, also, it is a general rule in equity that all persons materially interested either legally or beneficially in the subject-matter of the suit are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree, which shall bind all. In this case the very property, to wit, the equity of redemption which the complainants were seeking to foreclose, was at the date of the decree in the hands of the assignee. He was not made a party, was not bound by the decree, and lost no interest by virtue of the same.

It is strenuously insisted on by the counsel for the appellees that
145 every act of a court of competent jurisdiction shall be presumed to be rightly done until the contrary appears, and that this court must presume that the assignee was made a party to the foreclosure proceedings. It is only necessary to say, in reply, that such a presumption would be in the face of the whole record. Not an order interlocutory or otherwise made in the case refers in any manner to the assignee. Violent and extraordinary would be the conduct of a court that would have the temerity to announce that the rights of an individual were swept away or barred by a decree which did not purport in any manner to affect them. It is further contended that the foreclosure suit was a proceeding in rem and not in personam; that no personal decree was or could have been rendered against McClure. All this may be conceded, and the difficulty will still remain. Whatever rights McClure had at the commencement of the bankruptcy proceedings passed to his assignee. The bankruptcy proceedings antedate the decree. When that was made, Mechling was the owner of the equity of redemption. This suit was

brought to foreclose that. McClure then had no interest which could be effected, & the assignee was not before the court. Speaking on this subject, Clifford, J., in the case of Buchanan et als. vs. Smith, 16th Wall., remarks: "Until the debtor commits an act of bankruptcy, it is doubtless true that any creditor may lawfully sue out any proper process to enforce payment of debts overdue, and may proceed to judgment, execution, seizure, and sale of his property; but it is equally true that the appointment of an assignee under a decree in bankruptcy relates
146 back to the commencement of the bankruptcy proceedings, and that the instrument required to be executed under the hand of the judge or register assigns and conveys to the assignee all the estate, real and personal, of this bankrupt, including equitable as well as legal rights and interests and things in action as well as those in possession which belonged to the debtor at the time the petition in bankruptcy was filed."

In the case of Winslow vs. Clarke, 47th N. Y., 263, Rappallo, J., says: "At the time of the commencement of the foreclosure suit, the equity of redemption was vested by operation of law in the plaintiff, the assignee, and he was not made a party to the proceedings. This foreclosure, therefore, was of no effect as to him, and his equity of redemption remained in full force." That the assignee must be made a party I think is clear from the following authorities: Fisher on Mortgages, 191; Randall vs. Munford, 18 Vesey, 424; Ex parte Berry, 1 Dickens, 81; Monteith vs. Taylor, 9 Vesey, 615.

In the case of Russell vs. Clarke's Executors, 7 Cranch, 69, 2 Curtis, 459, C. J. Marshall holds that "assignees in bankruptcy are indispensable parties to a bill against the bankrupt and persons to whom he conveyed property in trust before he was decreed a bankrupt." If assignees could be dispensed with, new opportunities for the practice of frauds would be opened up. It would be an easy matter for one desirous of defrauding certain unsecured creditors to place on his estate mortgages in favor of some associate in his villa'ny, exceeding in amount the value of his property, with the understanding that when the property was sold there should be a division of the proceeds. In the
147 furtherance of such a transaction, the mortgagor would not be inclined to interpose obstacles when a suit looking to the sale of the property was instituted in court. The assignee stands as the representative of all the creditors, and he should be made a party in order that, if desirable, he may contest the validity of all deeds executed by the debtor, and assert in himself, for the benefit of creditors generally, a right to the whole fund; and, so believing, I find no difficulty in holding, both on principle and authority, that the decree in the foreclosure suit is simply a nullity.

It then becomes important to enquire whether the appellees can maintain an action of ejectment on the mortgage, or, to state it more precisely, can a creditor during the pendency of bankruptcy proceedings, enforce a lien against the estate of the bankrupt in a State or territorial court?

In the case of Deu vs. Stockton, 7th Halsted, 322; Williams vs. Bronston, 3 Gilm., 611; and Keuse vs. Kripp, 11 Ill., 104, it is laid down that a mortgagee does not divest himself of the right to maintain an action of ejectment by filing a bill to foreclose, procuring an order of sale and accepting the sheriff's deed for the premises. If the sheriff's sale is valid, the mortgagee, having become the purchaser, has a right to recover by virtue of the purchase and conveyance. If the sale is not valid, his mortgage still remains; and this rule must be applied to this case unless some controverting exception growing out of the peculiar situation of this property intervenes to arrest this action. Is the*ir* such an ex-

ception? Of the power of Congress to pass laws on the subject of
148 bankruptcy there is and can be no question; and when such a law is created, it is paramount, binding alike on Federal and State tribunals. The commencement of proceedings in voluntary bankruptcy transfers to the national courts the jurisdiction over the bankrupt's estate and all parties and questions connected therewith. The manifest object of the act of 1867 was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate in the most expeditious manner consistent with justice and equity. Cases pending in State courts at the date of the bankruptcy, where there is nothing in them which requires the equitable interference of the bankruptcy court to prevent any mischief or wrong to other creditors under the bankruptcy or any waste or misapplication of the assets, are not infrequently allowed to proceed and be consummated by proper decrees and judgments, especially when there is no suggestion of any fraud or injustice. Suits instituted subsequently are seldom if ever entertained by State tribunals. Jealous of their own jurisdiction, they have exhibited a commendable zeal in avoiding all occasion for conflict with Federal tribunals. In a late case the supreme court of Michigan declined to entertain a cause affecting bankrupt's estate on the ground that it was instituted subsequently to the bankruptcy, and that the jurisdiction of the national courts is exclusive. Speaking to the same point, the supreme court of Massachusetts, in Clifton vs. Foster, 103 Mass., 233, say: "Upon the institution of proceedings in bankruptcy and the appointment of an assignee, all the property of the bankrupt
149 passes into the custody of the courts of the United States, and cannot, while such proceedings are pending, be taken out of their custody upon any subsequent suit in a State court pending the bankruptcy proceedings. Therefore no order could be made on this petition for the sale of the real estate to satisfy the lien of the petitioners."

The same doctrine is announced in California, Wilson vs. Capuro, 41 Cal., 551. In the case of Whitridge vs. Taylor, 66 N. C., 275, it is held that the jurisdiction of the courts of bankruptcy is superior and exclusive for the purposes contemplated, except as is otherwise provided for in the statute. In this case the mortgagee was allowed to foreclose his mortgage, for the reasons that the adjudication in bankruptcy had taken place in the district court of Maryland, and because that court had no extra-territorial jurisdiction. It also appears that the assignee accepted service and was willing that the case should proceed. The late C. J. Chase, in re Wynne, 4 N. B. R., 5, says: "By the bankrupt act all the rights and all the duties of the bankrupt, in respect to whatever property not expressly excluded from the operation of the act he may hold, under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing the petition in bankruptcy, and all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superin'dance of the national courts. No lien can be acquired or enforced by any proceeding in a State court after petition is filed, though in case where
150 jurisdiction had been previously acquired by State courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested." It would seem clear from the foregoing authorities and numerous others which might be cited that a territorial court is without jurisdiction in cases arising subsequent to the bankruptcy. It seems to me that the true theory of the bankrupt act is to stop all things at the date of the bankruptcy and to divide the wreck of the man's property as it stood at that time, and that this divis-

ion and distribution is to take place under the direction, not of thirty different State courts, but of the district court of the United States. It is claimed by the appellees "that nothing in the bankrupt act shall be construed to annul, destroy, or impair any lien, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which may not be inconsistent with the provisions of this act," and that thereby such liens and mortgages and other securities are saved from the operation of the bankrupt act, and by inference from the jurisdiction of the national courts. I will answer this in the language of Judge Story, in Ex parte Christy, 3 How., 316: "There is no doubt that the liens, mortgages, and other securities within the provision of this act, so far as they are valid by State laws, are not annulled, destroyed, or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in
the courts of the United States as they would be in the State
151 courts. The district court, sitting in bankruptcy, is bound to respect and protect them. But this does not and cannot interfere with the right of the district court to enquire into their validity, extent, &c." Again he says, p. 319: "It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the district court to prevent irreparable injury or loss or waste of the assets without adverting to the case at bar. Let us put the case of numerous suits pending or to be brought into the State courts upon different mortgages, by the mortgagees, upon various tracts of land or property, some of the mortgages being upon the whole of the tracts of land; some upon a part only; some of them involving a conflict of independent titles; some of them involving questions as to the extinguishment or satisfaction or validity of the debts, and some of them involving very doubtful questions as to the construction of the terms and extent of the conveyances. If all such suits may be brought by the seperate mortgagees in the different State tribunals, it is most obvious that, as each of the State tribunals may or must proceed upon the single case only before it, the most conflicting decisions may be made, and gross and irreparable injustice may be done to the other mortgagees as well as to the general creditors under the bankruptcy. All this, however, is completely avoided by bringing the whole matters in controversy between all the mortgagees before the district court, making them
all parties, and thus enabling the court to marshal the rights and
152 priorities and claims of all parties, and by a sale and other proceedings, after satisfying the just claims of all the mortgagees, applying the residue of the assets, if any, for the benefit of the general creditors." It is claimed, however, that the rights of the mortgagee are impaired when you compel him to go to the district court for relief, and that the act must be unconstitutional. In reply I refer the counsel to the able and lucid opinion of Baldwin, J., appended to Ex parte Christy's case, where he fully concedes the power of Congress over the whole subject. The act has not left the party without a remedy quite as broad and efficacious as that afforded by State laws.

In bankruptcy the mortgagee may come to the court either as legal or as equitable mortgagee, and have his security sold and turned into money, or if the court shall be satisfied that the property pledged is not of greater value than the debt, the mortgagee can have it turned over to him, and, under the order of the court, be placed in immediate possession. What better or more speedy remedy can be furnished by any other tribunal?

There is another view of this case equally fatal to the claim of appellees. If this property is in the custody of the bankruptcy court, then no

other court can interfere with it. (Wiswall vs. Sampson, 14th How., 66; Ex parte Fisher, 2 Story, 160; In re Vogol, 2 B. R., 138; Angel vs. Smith, 9 Vesey, 335; Russell vs. East Anglinn R. R. Co., Mc. & G. Rep., vol. 3, p. 104.) It is claimed, however, that the appellant is a stranger to this bankruptcy proceeding, and is in no position to question the rights of the appellees. One thing is true: he is in possession of the prop-
153 erty, and whatever rights he has will be affected by the judgment rendered. Ejectment is not only a suit where questions of title may be tried, but also where rights of possession may be involved; and if the appellant has no right of property, he has one right common to all citizens, that of remaining in possession until ousted by a court of competent jurisdiction.

It is conceded, however, by my associates that if Eyster was the tenant of the assignee, the suit could not be prosecuted, for the reason that the possession of Eyster would be the possession of the bankruptcy court. The fallacy of the whole argument upon which their opinion rests consists in the fact that it overlooks the vesting of this estate in the bankruptcy court by operation of law. When McClure was adjudged a bankrupt, the law itself carried the estate into that court; and, being there, who has the right to interfere with it *to* any form except the assignee? The position of the assignee is analogous to that of a receiver. He is an officer of the court, created by the law, for the purpose of managing an estate to which the judge, on account of the pressure of judicial duties, is not supposed to be able to give his personal attention. The proper course to be pursued in reference to property in that condition, by any one who claims title, is to come into court and ask that his title be inquired into and settled. And if he holds a judgment or mortgage which is a prior lien, and is desirous of enforcing it against the estate after it has been taken into the care and custody of the court, he must obtain leave for this purpose.

154 It seems to me that where the law has carried the estate into the court, and we find a party in possession since the event, we are at liberty to presume that he is there as the agent and custodian of the court. The law presumes that every man in possession of property is there rightfully. It does not treat him as a trespasser or intermeddler of its own motion and without proof. It is said that no hardship can result from the admitting of the mortgagee into the possession; that he may be turned out at any time by the court. Why put him in, if the next day you may turn him out? "It has been argued," says Nelson, J., "that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case should be upheld. But conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the event of the litigation and to be applied to the payment of the judgment creditor; and in order to effect this the court must administer it independently of any rights acquired by third persons; otherwise the whole fund may have passed away out of its hands before the final decree." (Wiswall vs. Sampson, supra.)

It seems to me that the idea of a mortagee prosecuting an action of ejectment against property in the custody of the court after it has been placed there by the bankrupt law, is at war with the whole spirit of that system. If he gets possession, in what attitude does he stand? He becomes accountable for the rents and profits. Shall he be permitted to stay there until they satisfy his claim; and shall

155 the closing up of the estate await that event? Such a proceeding is anomalous and exceptional. I regret, then, that this court has committed itself to such a position. I believe, with C. J. Marshall, that the assignee was an indispensable party. I believe, with C. J. Chase, that after the bankruptcy no lien can be acquired or enforced against the bankrupt's estate. And I believe, with that distinguished and venerable jurist, Nelson, who for so many years has shed light upon the law, that interference with property in the custody of the court, without its leave, is a contempt of the court.

With these men I am willing to err, if error it be called. I therefore vote to reverse this judgment, with directions to the court below to dismiss the proceedings.

(Endorsed:) C. S. Eyster vs. Thos. Gaff. Opinion by Belford. Filed Sept. 13, 1873. David W. Crater, clerk.

156 And afterwards, to wit, on the sixteenth day of September, A. D. 1873, there was filed in the office of the clerk of the supreme court of Colorado Territory an affidavit that the property in question exceeds in value $2,000, which said affidavit is in the words and figures following, to wit:

Affidavit.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Christian S. Eyster, being first duly sworn, on oath deposes and says that he is the appellant in a certain suit lately depending in the supreme court of the Territory of Colorado, wherein Thomas Gaff and James W. Gaff were the appellees; that by said suit the title and ownership of certain real estate, to wit, lots numbered one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, in block number ninety-eight, (98,) in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado, was involved and put into controversy; that he, the said Christian S. Eyster, proposes to remove the said suit by writ of error from the supreme court of the Territory of Colorado to the Supreme Court of the United States; that deponent is well acquainted with the location of the said lots, and knows their value; that the value of said lots greatly exceeds the sum of two thousand dollars; and further deponent saith not.

CHRISTIAN S. EYSTER.

Subscribed and sworn to before me this sixteenth day of September, A. D. 1873, one thousand eight hundred and seventy-three.

Attest:

{ SEAL SUPREME COURT. } DAVID W. CRATER,
Clerk of the Supreme Court of the Territory of Colorado, and the seal thereof.

157 (Indorsed:) 79. In the Supreme Court of the United States. Christain S. Eyster, plaintiff in error, vs. Thomas Gaff and James W. Gaff, defendants in error. Affidavit that the property in question exceeds in value $2,000. Filed Sept. 16, 1873. David W. Crater, clerk.

And afterwards, to wit, on the twenty-second day of September, A. D. 1873, there was filed in the office of the clerk of the supreme court

of Colorado Territory a bond for writ of error, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

CHRISTIAN S. EYSTER, PLAINTIFF IN ERROR,
vs.
THOMAS GAFF AND JAMES W. GAFF, DEFENDANTS IN ERROR.

Know all men by these presents that we, Christain S. Eyster and Charles T. Y. McClure, of the city of Denver, county of Arapahoe, and Territory of Colorado, are held and firmly bound unto Thomas Gaff and James W. Gaff, their executors, administrators, or assigns, in the sum of four hundred dollars, lawful money of the United States, to be paid to the said Thomas Gaff and James W. Gaff, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this twenty-second day of September, A. D. 1873.

Whereas the above-bounden Christian S. Eyster hath prose-
158 cuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the Territory of Colorado:

Now, therefore, the condition of this obligation is such, that if the above-named Christian S. Eyster shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHRISTIAN S. EYSTER. [SEAL.]
CHARLES Y. McCLURE. [SEAL.]

Signed, sealed and delivered in presence of—
HYATT HUSSEY.
ASAHEL A. DENMAN.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Before me, George H. Mills, clerk of the district court in and for said county, personally came Charles Y. McClure, who, being by me first duly sworn, on his oath doth declare and say that he is a householder in the county of Arapahoe; that he owns property in said county subject to levy and sale; and that he is worth more than four hundred dollars over and above all his debts.

CHARLES Y. McCLURE.

Subscribed and sworn to before me this 22d day of September, A. D. 1873.

[SEAL.] GEORGE H. MILLS,
Clerk District Court First Judicial District
Colorado Territory.

(Indorsed:) 79. Eyster vs. Gaffs. Bond for writ of error. Filed Sept. 22, 1873. David W. Crater, clerk. Approved: E. T. Wells, associate justice supreme court Colorado.

And afterwards, to wit, on the twelfth day of November, A. D. 1873, there was filed in the office of the clerk of the said supreme court of Colorado Territory a writ of error and two citations, with proof of service thereon, in the above-entitled cause, which said writ of error and citations are hereto attached, and are in the words and figures following, to wit:

Writ of error.

159 UNITED STATES OF AMERICA:

The President of the United States to the judges of the supreme court of the Territory of Colorado, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Christian S. Eyster and Thomas Gaff and James W. Gaff, a manifest error hath happened, to the great damage of the said Christian S. Eyster, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

160 Witness the honorable Nathan Clifford, the first in precedence of the associate justices of the said Supreme Court, on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory,
and the seal thereof.

(Indorsed:) Writ of error. Filed Nov. 12, 1873. David W. Crater, clerk.

Citation and proof of service thereon.

161 UNITED STATES OF AMERICA, *ss:*

To Thomas Gaff and James W. Gaff, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein Christian S. Eyster is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, chief-justice of the supreme court of the Territory of Colorado, this twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-three.

EBENEZER T. WELLS,
Associate Justice Supreme Court Colorado.

On this first day of October, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared Christian
162 S. Eyster before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John Q. Charles, esq., attorney for Thomas Gaff and James W. Gaff, defendants in error in this case, on the first day of October, A. D. 1873.

CHRISTIAN S. EYSTER.

Subscribed and sworn to before me this first day of October, A. D. 1873.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory.

(Indorsed:) Supreme Court of the United States. Christian S. Eyster, plaintiff in error, vs. Thomas Gaff and James W. Gaff, defendants in error. Citation. Filed November 12, 1873. David W. Crater, clerk

163 UNITED STATES OF AMERICA, *greeting:*

To Thomas Gaff and James W. Gaff, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein Christian S. Eyster is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, the first in precedent of associate justices of the Supreme Court of the United States, this fifth (5) day of November, A. D. 1873, in the year of our Lord one thousand eight hundred and seventy three.

MOSES B. HALLETT,
C. J. Supreme Court Col. Ter.

TERRITORY OF COLORADO, *ss:*

On this twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared Chris-
164 tian S. Eyster before me, the subscriber, and makes oath that he delivered a true copy of the within citatation to John Q. Charles, Esq., attorney for the defendants in error, Thomas Gaff & James W. Gaff.

CHRISTIAN S. EYSTER.

Subscribed and sworn to before me this 12th day of November, A. D. 1873.

[SEAL.] DAVID W. CARTER,
Clerk of the Supreme Court of Colorado Territory.

(Indorsed:) 79. Eyster vs. Gaff. Citation & proof of service. Filed November 12, 1873. David W. Crater, clerk.

165 And afterwards, to wit, on the eighteenth day of November A. D. 1873, there was filed in the office of the clerk of the Supreme Court of Colorado Territory a præcipe for transcript of record, which said præcipe is in the words and figures following, to wit:

Præcipe.

TERRITORY OF COLORADO:

In the supreme court of the Territory of Colorado.

CHRISTIAN S. EYSTER, APPELLANT
vs.
THOMAS GAFF AND JAMES W. GAFF, APPELLANTS.

The clerk of the supreme court of the Territory of Colorado will please make out a transcript of the record and all other papers in this case, for transmission to the Supreme Court of the United States at Washington, pursuant to a writ of error filed herein, returnable to the second Monday of October next.

C. S. EYSTER,
Pltff. in Error.

To DAVID W. CRATER, Esq.,
Clerk Sup. Court Colorado Territory.
DENVER, *November 18th*, 1873.

The clerk will please leave out the paging & index of the original record, & and page anew.

C. S. EYSTER.

(Indorsed:) 79. Eyster vs. Gaffs. Præcipe for transcript of record. Filed November 18, 1873. David W. Crater, clerk.

166 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, David W. Crater, clerk of the supreme court of Colorado Territory, do hereby certify that I have compared the foregoing hereto-attached copy of the record and proceedings had in said supreme court in a cause lately therein pending, wherein Christian S. Eyster was appellant and Thomas Gaff and J. W. Gaff were appellees, with the original record and papers now remaining on file and of record in my office, and that the same are true and perfect transcripts therefrom, and the whole of their respective originals.

And I do further certify that the writ of error hereto attached, together with the citation, with service thereon, on folio 424, and the citation, with service thereon, on folio 427, are the original writ of error and original citations, with service thereon, heretofore filed in my office in the above-entitled cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said supreme court at Denver, in said Territory,
167 this thirty-first day of December, A. D. 1873.

[SEAL.] DAVID W. CRATER,
Clerk of Supreme Court of Colorado Territory.

Clerk's fees for transcript of record, 432 folios, 20c., 86.40; certificate & seal, 1.00—$87.40. Paid by Christian S. Eyster, plaintiff in error.

DAVID W. CRATER, *Clerk.*

168 In the Supreme Court of the United States.

CHRISTIAN F. EYSTER, PLAINTIFF IN ERROR,
vs.
THOMAS GAFF AND JAMES W. GAFF, DEFENDANTS IN ERROR.

Know all men by these presents, that we, Christian S. Eyster, Charles Y. McClure, and Frank W. Crocker, of the city of Denver, in the county of Arapahoe, and Territory of Colorado, are held and firmly bound unto Thomas Gaff and James W. Gaff, their executors, administrators, and assigns, in the sum of two thousand five hundred dollars, lawful money of the United States, to be paid to the said Thomas Gaff and James W. Gaff, their heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we do bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this fifteenth day of April, A. D. 1874.

Whereas the above-named Christian S. Eyster hath prose-
169 cuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of the Territory of Colorado: Now, therefore, the condition of this obligation is such, that if the above-named Christian S. Eyster shall prosecute his said writ of error with effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

CHARLES S. EYSTER. [SEAL.]
CHARLES Y. McCLURE. [SEAL.]
FRANK W. CROCKER. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN W. WEBSTER.
GEORGE W. McCLURE.

TERRITORY OF COLORADO, *ss:*

Before me, John W. Webster, clerk of the supreme court of the Territory of Colorado, personally came Charles Y. McClure and Frank W. Crocker, , and who, being by me first severally sworn, on their several and respective oaths, do each say that he is worth more than two thousand five hundred dollars, over and above their just
170 debts and liabilities, and that they each of them have property in said Territory, in Arapahoe County, property liable to execution and sale, worth more than that amount.

CHARLES Y. McCLURE. [SEAL.]
FRANK W. CROCKER. [SEAL.]

Subscribed and sworn to before me this 15th day of April, A. D. 1874.
[SEAL SUPREME COURT.] JOHN W. WEBSTER,
Clerk Supreme Court.

The above bond is approved this 16th day of April, 1874.
JAMES B. BELFORD,
Associate Justice.
EBENEZER T. WELLS,
Associate Justice.

TERRITORY OF COLORADO, *ss:*

I, John W. Webster, clerk of the supreme court of the Territory of Colorado, do hereby certify that the above and foregoing is a true and correct copy of the last original bond given in the above-
171 entitled cause, and filed in my office, on the sixteenth day of April, A. D. 1874, together with the affidavit of sureties, and the approval of the same by honorables James B. Belford and Ebenezer T. Wells, associate justices of the supreme court, his honor Chief-Justice Hallett not having yet received his commission as such.

Witness my hand and the seal of said supreme court, affixed at Denver, this eighteenth day of April, A. D. 1874.

[SEAL.] JOHN W. WEBSTER,
Clerk of the Supreme Court, Colorado Territory.

(Indorsed:) Christian S. Eyster, plff. in error, vs. Thomas Gaff and James W. Gaff, deft's in error. Bond in error. Copy. Filed April 16th 1874. John W. Webster, clerk.

(Also indorsed:) Sup. Court U. S., 1873. Octo. term. No. 691. Christian S. Eyster, plff. in error, vs. Thomas Gaff & al. Copy of appeal-bond. Filed 24th April, 1874.

172 In the Supreme Court of the United States.

CHRISTIAN S. EYSTER, PLAINTIFF IN ERROR,
vs.
THOMAS GAFF AND JAMES W. GAFF, DEFENDANTS IN ERROR.

Know all men by these presents that we, Christian S. Eyster, Charles Y. McClure, and Frank W. Crocker, of the city of Denver, in the county of Arapahoe, and Territory of Colorado, are held and firmly bound unto Thomas Gaff and James W. Gaff, their executors, administrators, and assigns, in the sum of two thousand five hundred dollars, lawful money of the United States, to be paid to the said Thomas Gaff and James W. Gaff, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this fifteenth day of April, A. D. 1874.

Whereas the above-named Christian S. Eyster hat' prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court
173 of the Territory of Colorado:

Now, therefore, the condition of this obligation is such, that if the above-named Christian S. Eyster shall prosecute his said writ of error with effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

CHRISTIAN S. EYSTER. [SEAL.]
CHARLES Y. McCLURE. [SEAL.]
FRANK W. CROCKER. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN W. WEBSTER.
GEORGE W. McCLURE.

TERRITORY OF COLORADO, *ss:*

Before me, John W. Webster, clerk of the supreme court of the Territory of Colorado, personally came Charles Y. McClure and Frank W. Crocker, and who, being by me first severally sworn, on their several and respective oaths, do each say that he is worth more than two thousand five hundred dollars, over and above all their just debts and liabilities, and that they each of them have property in said Territory, in Arapahoe County—property liable to execution and sale—worth more than that amount.

CHARLES Y. McCLURE.
FRANK W. CROCKER.

Subscribed and sworn to before me this 15th day of April, A. D. 1874.
[SEAL.] JOHN W. WEBSTER,
Clerk of the Supreme Court.

174 The above bond is approved this 16th day of April, A. D. 1874.
JAMES B. BELFORD,
Associate Justice.
EBENEZER T. WELLS,
Associate Justice.

Approved this 22nd day of April, A. D. 1874.
MOSES HALLETT,
C. J. Sup. Court Col. Ter.

TERRITORY OF COLORADO, *ss:*

I, John W. Webster, clerk of the supreme court of the Territory of Colorado, do hereby certify that the above and foregoing is a correct and true copy of the last original bond given in the case therein entitled, and filed in my office on the sixteenth day of April, A. D. 1874, together with the affidavit of sureties, and the approval of the same by the honorable James B. Belford and Ebenezer T. Wells, associate justices, and also of the approval of the same by the honorable Moses Hallett, chief-justice of the supreme court of Colorado Territory, made on the 22d day of April, A. D. 1874.

Witness my hand and the seal of the supreme court of the Territory of Colorado this 22d day of April, A. D. 1874.
[SEAL.] JOHN W. WEBSTER,
Clerk of the Supreme Court of Colorado Territory.

175 (Indorsed:) Sup. Court U. S., 1873, Octo. term. No. 691. Christian S. Eyster vs. Thomas Gaff & al. Copy of appeal-bond approved by ch. jus. Colorado sup. ct. Te'ry. Filed 26th April, 1874.

(Indorsement on cover:) No. 134. Christian S. Eyster, plaintiff in error, vs. Thomas Gaff and James W. Gaff. Colorado Territory sup. court. Filed 19th January, 1874.

Supreme Court of the United States.

CHRISTIAN S. EYSTER, Plaintiff in Error,

vs.

THOMAS GAFF AND JAMES W. GAFF, Defendants in Error.

No. 134. Oct. Term, 1875.

WRIT OF ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

STATEMENT OF FACTS.

This is a writ of error to review the judgment of the Supreme Court of the Territory of Colorado, in an action of ejectment originally brought by the defendants in error against Eyster, the plaintiff in error, to gét possession of certain lots in the city of Denver, viz: Lots Nos. 1, 2, 3, 4, 5, and 6, in block 98 of the east division of said city.

The leading facts out of which this controversy arises, as they appear by the bill of exceptions, were these:

The lots in question were originally owned by Geo. W. McClure, of the city of Denver, and *Eyster, the plaintiff in error, had been his tenant in possession of them.* But when his possession began or was to end, does not appear.

On the 3d day of September, 1866, McClure mortgaged these lots, together with other property, to Austin M. Clark, to secure the payment of his note of the same date, at 12 months, for the sum of $20,000, bearing interest at

the rate of 1½ per cent. per month. (Printed Record, pp. 38, 39.)

On the 2d day of February, McClure made a *second mortgage* of the same property to the Gaffs, to secure the payment of his three promissory notes for $6,000 each, all dated February 2, 1867, and payable successively with interest at the rate of 3 per cent. per month, in 3, 6, and 9 months from date. (Printed Record, pp. 36, 37.)

On the 28th day of September, 1868, the Gaffs bought the first mortgage, and took an assignment of it, and of the note secured by it, from Clark. (Printed Record, pp. 34, 40, 52.)

On the 11th day of December, 1868, the Gaffs (they being the owners of both the mortgages, and of the notes secured thereby, and the money being due and unpaid,) filed their bill in equity to foreclose the said mortgages, on the chancery side of the District Court of Arapahoe county *against McClure—alone—the said Eyster not being made a party.* The bill is in the ordinary form, and a copy of it will be found in the printed record, at pp. 33 to 36.

On the 10th day of May, A. D. 1870, (*before* the final decree of the said District Court on the bill to foreclose the said mortgages,) the said George W. McClure filed, *in the Supreme Court of the Territory of Colorado, his petitton in bankruptcy*, in due form of law, with the proper and appropriate schedules, duly verified according to law, praying that he might be adjudged a bankrupt, and that he might have a certificate of discharge under the bankrupt act of Congress. A copy of the petition and of the accompanying schedules will be found on pages from 9 to 15 of the printed record.

In Schedule A[1], attached to the petition, the petitioner returned debts to the amount of over $2,500, for *taxes, which were a prior lien on said property.* (See Printed Record, p. 10.)

On page 11 of the printed record, in the appropriate schedule, the petitioner reported to the court the debt due to Thomas and James W. Gaff; and on page 12 of the

printed record the petitioner, in the proper and appropriate schedule, returned the property in question in this suit, and his other real estate as subject to those two mortgages.

At the bottom of page 15 of the printed record, in an amended schedule, properly verified and allowed by the court, the said George W. McClure, bankrupt, returned to the court *C. S. Eyster*, the plaintiff in error in this case, *as the tenant of the lots in question*, to wit, lots 1, 2, 3, 4, 5, and 6, in block No. 98, with the amount of rent then due.

On the 11th day of May, A. D. 1870, the said George W. McClure, on his petition, was duly adjudged a bankrupt, in accordance with the provisions of the act of Congress. (See Printed Record, p. 17.)

On the 11th day of May, A. D. 1870, a warrant in bankruptcy was duly issued by the register in bankruptcy of said Supreme Court, against the said George W. McClure, directed to the marshal of the Territory of Colorado Territory, and placed in his hands for execution. (See Record, pp. 17 and 18.)

On pages 18 and 19 of the printed record, it appears that the said marshal made return, that on the 13th day of May, A. D. 1870, he had duly notified the creditors of the said George W. McClure, in the said warrant mentioned, (*among whom were the defendants in error*,) of the said adjudication, and of the time fixed for the first meeting of the creditors of the said George W. McClure. But they disregarded the notice and took no part in the bankrupt proceedings. On the 4th day of June, A. D. 1870, *John Meckling* was duly appointed assignee in bankruptcy of the estate of the said George W. McClure; and on the same day he accepted the said appointment. (See pages 20 and 21, printed record.) (There is an error in the date, as there stated. It is stated *May* 4th, by mistake, whereas in the original record it is *June* 4th, 1870.)

On the 9th day of June, A. D. 1870, Samuel E. Brown, Esq., register in bankruptcy of said court, made, executed, and delivered to the said John Meckling, assignee as afore-

said, a deed of assignment, in due form of law, of the estate and effects of the said George W. McClure, bankrupt, in bankruptcy; which deed was duly filed in said court, *and duly recorded in the recorder's office of Arapahoe county.* (See Printed Record, page 22.)

On the 30th day of June, A. D. 1870, the day before the Gaffs obtained their decree of foreclosure in the District Court, a certificate in due form of law, of the register in bankruptcy of the Supreme Court of Colorado, certifying that the said McClure was duly adjudged a bankrupt, and that John Meckling was his duly appointed assignee, was *filed in the said suit to foreclose the said mortgages.* (See printed record, pages 58 and 59.) Thus, the litigants and that court had this additional and special notice of the fact, that McClure was a bankrupt at that time, and had an assignee who had rights to be barred.

On the 1st day of July, A. D. 1870, the District Court of Arapahoe county, on the motion of the complainants, made a decree on the said bill to foreclose the said mortgages against the said McClure only, without making Eyster or the assignee parties to the Bill or to the Decree rendered.

It was recited therein that there was then found to be due from the said McClure to the said Gaffs, the sum of $69.066; which sum the said McClure was ordered and adjudged to pay to the complainants within thirty days from that date, and that in default of such payment the special master therein appointed was ordered to sell the premises described in said mortgages. (See Record, pages 56, 57, and 58.)

On the 2d day of August, A. D. 1870, John Meckling, the assignee in bankruptcy, filed his petition in the Supreme Court of the Territory of Colorado, in which it was recited that *Christian S. Eyster* (the present plaintiff in error) *was a tenant of said property.* (See Printed Record, page 24.)

On the 27th day of August, A. D. 1870, Henry W. Hubbard, the special master in chancery, sold the premises in the said mortgages mentioned, *among which was the property*

in question; and Thomas Gaff and James W. Gaff became the purchasers thereof. (See his report, pages 59, 60, and 61, Printed Record.) The special master made due return of the sale, and his report and deed to the Gaffs were duly confirmed by the court. (See Record, 63.)

On the 11th day of November, 1870, George W. McClure filed his petition *in the Supreme Court of the Territory of Colorado*, in due form of law, praying for a discharge as a bankrupt, duly verified. (See Record, p. 29.)

On the 28th day of December, 1870, George W. McClure was, by the Supreme Court of the Territory of Colorado, in due form of law, discharged as a bankrupt, under the terms and provisions of the bankrupt act.

As appears by the record, *neither James W. Gaff nor Thomas Gaff, nor any person for them, ever proved their claim, or any claim against George W. McClure or his estate in bankruptcy;* nor did they at any time obtain the authority of the bankrupt court to proceed against him or his property in the hands of his assignee as an officer of that court; nor did they bar his rights thereto by making him a party to their bill to foreclose. They ignored the bankruptcy of McClure from beginning to end. *Although notified of the fact according to law* in the various ways already stated, they proceeded as if there was no bankrupt law, no bankrupt court, no bankrnptcy of McClure, and no assignee in bankruptcy, invested by that law with the legal title to and possession of all the property of the bankrupt, real and personal, (with certain exceptions,) subject only to *the lien* of their mortgages, *when proven and allowed by that court.*

Under these circumstances and in this state of things, on the 2d day of June, 1871, the Gaffs, the defendants in error, brought this action of ejectment in the District Court of Arapahoe county against Eyster, who had been the tenant of McClure, and who still remained in possession of the property in question as the tenant of the assignee in bankruptcy, to recover the said property. They declared that they, being in possession thereof on the 1st day of October, 1869, the defendant, Eyster, afterwards, viz, on the

1st of December, 1869, entered into the possession thereof, and unlawfully withholds the possession from the said plaintiff, who claims title to the said premises in fee. The defendant, on the 19th of June, 1871, by his attorneys, *John Meckling* and M. M. Benedict, pleaded not guilty, &c., and issue was joined. It will be observed that *John Meckling, the assignee in bankruptcy* of McClure, was one of the defendant's attorneys in defending this action. (Printed Record, pp. 2 and 3.)

(His name is printed John *Mukling*, but that is a mistake, as appears by reference to a telegram from the clerk of the District Court to the clerk of this court; the letters "*ec*" in the manuscript being easily mistaken for the letter "*u*" in copying the record.)

A jury was waived by consent, and it was "agreed that the judge of the court should try the cause on the issue joined thereon, and find *according to the evidence produced before him, according to law.*," (Printed Record, p. 4.)

On the trial the plaintiffs, after showing a claim by McClure, and a conveyance from James Hall to McClure for the lots in question, by deed dated August 11, 1865, then offered in evidence the second mortgage from McClure to them, dated February 2, 1867, which was received and read in evidence. (Printed Record, p. 7.)

"It was then admitted by the defendant that James Hall, probate judge of Arapahoe county, entered the Denver town site, of which the lots in question are part, on the 5th of May, A. D. 1865, at the United States land office in Denver, and that a patent was issued to him by the United States for the same thereafter. And the plaintiff rested.

Whereupon the defendant, to maintain the issues joined in this case by him, offered to read in evidence to the court a certified copy of the proceedings of the Supreme Court of Colorado Territory, for the District of Colorado, in bankruptcy, *by which George W. McClure is* [*was*] *discharged in bankruptcy*, with accompanying schedules, dated May 9, 1870; also copies of orders, &c., thereon; which offer and the reading of which papers was then and there objected

to by the plaintiffs by their counsel for the following reasons:

First. Certified copies are not the best evidence.

Second. Because the same are *irrelevant, except to show bankruptcy of McClure, and the appointment of an assignee. The assignee took only an equitable title, which cannot be set up here;* which objections were then and there overruled by the court, and the papers offered were allowed to be read in evidence," and the plaintiffs excepted. (Printed Record, pp. 9 to 33.)

The defendant then further to maintain the issues in said cause on his part, offered to read in evidence *the bill in chancery filed in the District Court of Arapahoe county*, in the case of Thomas Gaff and James W. Gaff against George W. McClure, filed in said District Court on the chancery side of said court, on the 11th day of December, 1868, with the exhibits to said amended bill, and also the writ issued thereon out of the said court, and the return thereon, and also the master's report of the proofs taken in the said cause, and the exhibits and papers thereto attached, and also the decree of foreclosure entered by the court therein, on the 1st day of July, 1870.

To the offering and reading in evidence of which papers, as evidence in the cause, the plaintiff then and there objected, and made *a general objection* thereto; which objection was then and there overruled by the court, and the aforementioned *bill, writ, master's report*, and *decree*, with their several and respective exhibits, were then and there allowed by the court to be read; to which ruling of the court plaintiff's counsel excepted, and all of the said papers were then read in evidence in the cause. (Printed Record, pp. 33 to 58.

After which the defendant, further to maintain the issue in this cause on his part, offered to read in evidence register in bankruptcy's certificate of the appointment of John Meckling assignee in bankruptcy of the estate of George W. McClure, and the assignment to the said Mechling, *filed in the District Court of Arapahoe county in said cause of Gaff et al. against McClure, June* 30, *A. D.* 1870.

To the introduction of which in evidence, and the reading of the same in said cause, the plaintiffs, by their counsel, then and there objected, first, because it does not appear to be filed by authority of attorney, and is not entitled in said chancery suit; which objections were then and there overruled by the court, and the paper was allowed to be read in evidence; to which ruling plaintiffs' counsel excepted. The paper was read, and bears this indorsement: "(Indorsed,) 1864. Gaff *et al. vs.* McClure. Certificate of bankruptcy, filed June 30th, 1870. Oliver A. Whitemore, clerk." The defendant there rested. (Printed Record, p. 58 to 59.)

After which *the plaintiffs*, further to maintain the issues in the said cause on their part, offered to read in evidence to the court the certificate of the sale of the master of these premises to the plaintiff; also the report of the master of his sale of these premises to the plaintiff, and the confirmation of the same by the court; and also the deed of the master for the premises in question to the plaintiff, *for the purpose of showing the final conclusion of the chancery proceedings given in evidence by the defendant, and title in the plaintiffs.*

To the introduction in evidence and the reading of any or all of the said papers the defendant, by his counsel, then and there objected, first, that they, or any of them, were *not rebutting* of anything the defendant had offered in evidence; second, that they were not relevant. Which objections were then and there overruled by the court, and the papers allowed to be read in evidence; to which ruling the defendant excepted, and the papers were read in evidence. The plaintiffs there rested, and the cause was submitted to the judge, as aforesaid, *on the said evidence.*" (Printed Record, p. 59 to 65.)

Thus it appears that the general defence made by Eyster, and shown, both directly and indirectly, by the records of the judicial proceedings offered in evidence by him, was two-fold:

1st. That he had been a tenant of McClure, (without stating the terms of his tenancy;) that McClure had be-

come bankrupt; that his assignee had legally succeeded to the title and possession of the premises of the bankrupt held by him; that he had become the tenant of the assignee, and that, as such, he defended his possession under the paramount title of the assignee in bankruptcy.

2d. That the decree of the foreclosure of the mortgages, by reason of the bankruptcy of McClure, and the failure of the mortgagees to make him and the assignee in bankruptcy parties thereto, &c., was inoperative and void.

The controversy was not *one of fact*, turning upon the legitimacy or illegitimacy of Eyster's possession of the premises, or of the title under which he held, (for these were not disputed facts,) but *one of law*, turning mainly, although not exclusively, on the relative superiority of the rights of the assignee and of the mortgagees under the bankrupt law. This is perfectly evident from the line of evidence offered, and from the objections to the admission of evidence made, by both sides.

The judge found the issues joined in the cause for the plaintiffs, and rendered judgment accordingly. (Printed Record, p. 4.)

An appeal was then prayed for by the defendant, and allowed from that judgment to the Supreme Court of the Territory of Colorado, and errors were assigned in that court, as set forth in the printed record, p. 66 to 68.

After argument thereon in that court, on the 27th day of March, 1873, the judgment of the District Court in the action of ejectment *was unanimously reversed.* (Printed Record, pp. 70, 77.)

Afterwards, on the same day, a petition for a rehearing was filed by the appellees, (the Gaffs,) which was granted by the court, and May 25, 1873, was fixed as the last day for filing written arguments in the cause. (Printed Record, pp. 70–72.)

In their petition the appellees alleged that the Supreme Court had erred in their said decision and judgment in this—

"First. In that the court held that, because in the chan-

cery suit begun long before the filing of the petition in bankruptcy by McClure, the assignee was not made a party to the bill before the decree rendered, therefore the decree is void, and this portion of said opinion is erroneous."

"Second. Because the court erred in holding that the ejectment suit could not be maintained without leave of the bankrupt court."

"Third. The court erred in assuming as a fact that the rights of the bankrupt or his assignee were involved in this case, and that appellant claimed under them, or one of them, when the same in no way appears from the record." (Printed Record, pp. 70–72.)

As this was the first time that the pretext set up in the "third" ground of the petition for a rehearing was ever made in the case, it was disregarded by the appellant.

After the time for filing arguments in the case had expired, viz., May 25, 1873, it was discovered by appellee's counsel that they had not proved Eyster's possession of the premises in question on the trial. Not denying the fact, but relying mainly upon his known possession as tenant of the assignee in bankruptcy, at their request he promptly agreed to sign a stipulation admitting the fact of his possession, but without expressly defining therein the nature and character of his possession. Accordingly, on the 1st day of September, 1873, a stipulation was filed by him and them, agreeing to amend the bill of exceptions, so as to show, "1st, that it was admitted on the trial of the cause that the defendant was in the possession of the premises described in the declaration, at the time of the commencement of said suit, and *prior thereto;*" 2d, to correct any *mistakes* as to *dates* made in copying from any of the original papers in the bankruptcy case of McClure, given in evidence by the appellant; and 3d, by inserting at the close of the testimony in said bill of exceptions the words: "This was *all* the evidence offered [or?] given in evidence on the trial of said cause. (Printed Record, p. 73.)

Afterwards, on the 6th of September, 1873, John Meckling, assignee of McClure, (not that it was necessary, but out of abundant caution,) came into the Supreme Court, (which was also the court in bankruptcy having the estate in question in its special charge,) and filed his petition, "praying that he, as such assignee in bankruptcy of the said George W. McClure, may be let in to defend in this suit, and be made a party therein, as of right he may be." (Printed Record, pp. 73, 74.)

On the 13th day of September, 1873, after argument, the petition was denied on the ground that "inasmuch as the petitioner was *not a party to the suit* in the court below, he should not be heard in this cause in this court;" and on the same day the judgment of the District Court, in the action of ejectment, was *affirmed* by the action of a majority of the Supreme Court. The opinion of the majority of the judges of that court was delivered by Wells, J., (the same judge who tried the case in the District Court;) and that of the minority, by Belford, J. They will be found in the Printed Record, p. 76 to 85.

To review that judgment, the present writ of error was sued out of this court by Eyster, the plaintiff in error, and filed herein on the 19th day of January, 1874.

Assignment of Errors.

The Supreme Court of Colorado erred in affirming the finding and judgment of the District Court of Arapahoe county, in the following particulars:

1st. It erred in holding that, under the submission and the evidence in the cause, the defendants in error were entitled to recover in their action of ejectment.

2d. It erred in "passing by all questions as to whether the *assignee* of McClure was or was not a *necessary party to the bill* to foreclose, and as to whether the *decree* given therein *after* the bankruptcy, and *without joining him*, is or is not void."

3d. It erred in holding that the appellees (the defendants in error) were properly permitted to recover in the court below, (the District Court,) *upon their mortgage alone;* and that "this results *necessarily* from the nature of the mortgagee's estate, and the relation of the assignee (in bankruptcy) thereto," notwithstanding the bankruptcy of McClure, and the fact that his whole estate was in the hands of the bankrupt court; that they had not proved their debt therein, nor obtained the authority of that court to proceed thereon, nor made his assignee a party to their bill to foreclose their mortgages; and that from the beginning to the end of their proceedings, they had totally ignored the bankrupt court and its exclusive authority and jurisdiction under the bankrupt law.

4th. It erred in holding that, "where an estate is assigned, (in bankruptcy,) subject to mortgage, it ought not to be said *in any case* that, as *matter of law*, (nothing being shown as to the fact,) the assignee has either the actual or *constructive* possession;" and that, as "in the present case, the appellant (the plaintiff in error) *had not in any way connected himself* with the assignee, (in bankruptcy,) nor shown even that the assignee had ever assumed, or attempted to assume, *the possession* of the premises;" he, as a defendant in the action of ejectment, could not defend his possession under the outstanding title of the assignee in bankruptcy, without such preliminary and affirmative proof.

5th. It erred in holding that, notwithstanding the bankruptcy of McClure, as shown by the defendant in the action of ejectment, the plaintiffs therein ought to be allowed to proceed and to recover the premises against the defendant—in the absence of additional proof *by him* that the assignee *had not disclaimed* the statutory title and possession of that part of the estate of the bankrupt which had been devolved upon him by law; instead of holding and requiring the evidence of the fact of *such disclaimer* (if it existed and was available) to be made by the plaintiffs, in avoidance of the

outstanding title of the assignee, as shown by the defend ant; thereby, transferring the burden of such proof from the plaintiff to the defendant.

ARGUMENT.

FIRST ERROR.—The court erred in holding that under the submission and the evidence in the cause, the defendants in error were entitled to recover in their action of ejectment.

This point was made, in various forms, in the 6th, 9th, and 11th specifications in the assignment of errors in the Supreme Court of Colorado; and under it, the judgment of the court must be reversed for want of sufficient evidence on the part of the plaintiffs in support of the affirmative of the issue.

The fact of the possession of the premises by Eyster was admitted by the pleadings; and also by the amendment of the bill of exceptions. (Printed Record, p. 73.)

By the 57th section of the act of Colorado, passed Nov. 7, 1861, entitled "An act concerning ejectments," it is provided "that it shall not be necessary, in trials of ejectment, when it shall appear by the return that the defendant or defendants were in possession of the premises at the time when the suit was brought, for the plaintiff to prove that said defendant or defendants were in possession at the time of bringing such suit—unless the defendant or defendants shall, by special plea, deny that he, she, or they were in possession, and that *the plea of not guilty shall not put in issue the possession of the said premises*, anything in the act to the contrary notwithstanding." (General Laws of 1861, p. 380.) There was no return, but under the provision of the 17th section of the same act, (ib., p. 371,) the defendant appeared, by pleading the general issue to the declaration. (Printed Record, p. 3.) *The nature and character of the defendant's possession*, therefore, was the only question raised by the issue, made by the pleadings.

After showing title to the premises in McClure, and his mortgage to them, dated Feb. 2, 1867, the plaintiffs rested.

(Printed Record, p. 7 to 8.) According to the stipulation amending the bill of exceptions, showing "that it was admitted, on said trial, that the defendant in said cause was in the possession of the property and premises described in the declaration in said cause, at the time of the *commencement* of said suit *and prior thereto*," "this was *all* the evidence offered (or) given on the trial of said cause" by the plaintiffs, in regard to the nature or character of the defendant's possession. (Printed Record, p. 73.)

It was not enough, according to the principles of the action of ejectment, simply to show that the defendant was in possession of the premises. That was not the issue. The plaintiffs were bound to go further, and to show *that he held in subordination to their title.* The burden of proof was upon them; but, according to the record, they offered no such evidence. They showed nothing in regard to the nature or character of the defendant's possession—whether he held "as a stranger" or as a tenant of McClure, and if as such tenant, *how* he held or *when* his tenancy began: whether *before* or *after* the date of the mortgage offered in evidence, or whether he held as a tenant from year to year or for a term of years not yet expired. In short, they offered no evidence tending to show that the possession and title of the defendant were subsequent to and subordinate to the title acquired by their mortgage; and of course they failed. Upon the showing made by the plaintiffs, upon common law principles, (even if the defendant had not offered a particle of evidence,) the finding and judgment of the court should have been for the defendant.

By the first section of the act concerning ejectments, it is provided that

"The action of ejectment may be brought in the cases and manner usual at common law, subject to the provisions hereinafter contained. (General Laws of 1861, p. 368.)

The only other sections relating to this point are the 19th and 20th. They provide as follows:

"SEC. 19. It shall not be necessary for the plaintiff to prove

an actual entry under title, nor the actual receipt of any of the profits of the premises demanded, but *it shall be sufficient for him to show a right to the possession of such premises* at the time of the commencement of the suit as heir, devisee, or otherwise.

"SEC. 20. It shall not be necessary on the trial for the defendant to confess, nor for the plaintiff to prove, lease and ouster, or either of them, except as provided in the next section, [relating to tenants in common and joint tenants;] but this section shall not be construed to impair nor in any way to effect [affect?] any of the rules of evidence now in force in regard to the maintenance and defense of the action." (General Laws of 1861, pp. 371–372.)

That is to say, that, with the special exceptions made by the statute, the rules of the common law of evidence in the action of ejectment are in full force in the Territory of Colorado.

From the state of the record, the defendants in error and the Supreme Court of Colorado are involved in an inextricable dilemma.

Either the title of the mortgagees or the title of the assignee in bankruptcy was the superior legal title; and Eyster was in possession of the premises either, first, as the tenant of McClure, and afterwards as the tenant of the assignee in bankruptcy, or he was there as a mere possessor or "stranger."

If, then, the title of the mortgagees was the superior legal title, and Eyster was in possession of the premises either as a tenant of McClure, in subordination to their title, or as a mere possessor or stranger, *they failed to show either of these facts;* and therefore he was entitled to the finding and judgment of the District Court.

If, on the contrary, the title of the assignee in bankruptcy was the superior legal title, and Eyster was in possession of the premises either, first, as the tenant of McClure, and afterwards as the tenant of the assignee, or even as a mere possessor or stranger, then, in either of these alternatives, he had a right to defend his possession, as he did, by setting up and relying upon the title of the assignee

as the superior outstanding title; and for this reason, also, he was entitled to the finding and judgment of the District Court. In either of these alternatives, therefore, the judgment of the Supreme Court of Colorado was erroneous, and it must be reversed.

The common law authorities on these points are full and clear.

"In case the ejectment is against a third person who holds the mortgaged lands, as tenant to the mortgagor, it will be necessary to give evidence *in addition* to proof of the mortgage, *of the tenancy*, and either that the same has *determined* or that it was created by the mortgagor *subsequently* to the execution of the mortgage, although, as before averred, in such case no notice to quit is made necessary." (Tyler on Ejectment, &c., p. 545.)

"If however, the party in possession is not the mortgagor himself, but a person *claiming under a tenancy* created by the mortgagor *prior* to the mortgage, the mortgagee will be bound by it, and cannot eject the tenant, on the mortgage becoming forfeited. (Doe *v.* Wharton, 3 Term R., 2; Thunder *v.* Belcher, 2 East. R., 449.") (Ib., p. 170.)

The defendants in error offered no evidence on these points. Nor, is their condition improved by the doctrine of estoppel, because no privity or tenancy of the plantiff in error, subordinate to their mortgage has been proved by them; nor is it improved by the doctrine of retro-relation, under the forclosure and sale of the mortgaged premises, for the same reason; and also for the further reason that the plaintiff in error was no party to the proceeding; it was "*res inter alios acta.*"

"From the well settled principle that a claimant in ejectment must recover on the strength of his own title, comparatively little can be said respecting the evidence necessary on the part of the defendant.

"The lessee of the plaintiff is always required in the first instance to make out a *clear* and *substantial title to the premises in question.* The rule in the cases considered in the last chapter [that is, *where a privity exists* between the plaintiff and the defendant, p. 543] does not militate against this

principle. In these cases the proof of the *relation* existing between the parties must in some way *be clearly established;* and therefore, the defendant's evidence is altogether confined to falsifying his adversary's proofs or to rebutting the presumptions which may arise out of such proofs.

"He need not show that he has himself any claim whatever to the premises, nor give evidence of a title in a third person, if he can make it appear to the jury that a *legal* title does not subsist in the plaintiff. (Tyler on Ejectment, &c., p. 560.)

"The defendant in an action of ejectment, who is *a mere possessor*, without claim of title, may give evidence tending to raise a presumption that the title under which the plaintiff claims is extinct, * * * and by thus showing the title out of the lessors of the plaintiff, the defendant may protect his premises, *although he may be unable to trace such title to himself.* A defendant in an action of ejectment is entitled to avail himself of an outstanding title against the lessors of the plaintiff. Although he is in possession without color or claim of title, his possession is good against all the world except the *legal owner*, and by showing the title in another, he destroys the plaintiff's right to recover." (Ib., p. 564.)

SECOND ERROR.

2d. It erred in "passing by all questions as to whether the *assignee* of McClure was or was not a *necessary party to the bill* to foreclose, and as to whether the *decree* given therein *after* the bankruptcy, and *without joining him*, is or is not void." (Printed Record, p. 76.)

The points covered by this assignment of error relate to the legal effect of the bankruptcy of the mortgagor on the suit pending in the District Court of the Territory to foreclose the mortgage, and to the *invalidity* of its decree rendered at the instance of the mortgagees after his bankruptcy, without first amending their bill and making his assignee a party to that proceeding.

The argument on this branch of the case is so fully and

so ably presented in the dissenting opinion of Judge Belford, that it is adopted as the argument here in support of this assignment of error. (See Printed Record, p. 79, fol. 143, to p. 81, fol. 147.)

We submit also an additional argument in answer to the objection made by some of the authorities, that, as between the mortgagees and the assignee in bankruptcy, it was as much, and even more the duty of the *assignee*, after the bankruptcy of the mortgagor, to make himself a party defendant to the suit to foreclose the mortgage, than it was the duty of the *mortgagees* to make him a party to that proceeding; and that therefore the decree of foreclosure and the sale of the mortgaged premises under it, were *not* invalid because he was not made a party defendant, by them.

Of the fact of the bankruptcy of the mortgagor, the mortgagees were duly and fully notified, both *in fact* and *in law*. The bankrupt in his schedule had mentioned their mortgages, and the assignee, as required by law, had notified them of the bankruptcy of the mortgagor. The assignee had also, as required by law, recorded a copy of the deed of assignment to him in the recorder's office of the county where the land was situated. What ground is there for saying, that this elaborate system of notice was not designed to affect *existing*, as well as *future* proceedings by the creditors of the bankrupt? A copy of the deed of assignment was also filed in the foreclosure suit in the District Court, before the decree of foreclosure was rendered; but by whom it was filed, does not appear. It is useless, therefore, to say that the mortgagees had not full notice, both in fact and in law, of the bankruptcy of the mortgagor. It is equally useless to say, that the assignee in bankruptcy had not the same notice of the existence of these mortgages; but it does not appear, that he had the same notice of the pendency of the suit to foreclose them. Even if he had, it is not important in the view of the question now presented. But for the sake of the argument, we will suppose that the mortgagees and the assignee each had equal knowledge of the fact, on both sides, viz: that

the assignee, on the one side, knew of the existence of the mortgages, and of the pendency of the suit to foreclose them; and that the mortgagees, on the other side, also knew of the bankruptcy of the mortgagor. As between these two parties, each having equal knowledge of the facts, the question, then, is, upon which of them, according to legal principles, was it the more incumbent duty to take notice, in reference to the suit to foreclose the mortgages, of the changed condition of things wrought by the bankruptcy of the mortgagor, the defendant in that suit? Which of these parties was *the actor, with reference to that proceeding*—the mortgagees or the assignee? Must a defendant voluntarily come into court, and ask to be made a party, or must he be brought in by the plaintiff, who wishes to follow up the proceeding, notwithstanding the bankruptcy of the defendant?

It is said that courts do not take judicial notice of each other's proceedings. That is true; but that suggestion does not fully meet the difficulty of the case. It is not simply a question of *priority* of jurisdiction between courts having *concurrent* jurisdiction of the same subject-matter. If it was, then it might be said that the District Court, having first acquired jurisdiction of the cause, would have a right to proceed to final judgment; but even then, only after making the necessary parties. On the contrary, it is a question of jurisdiction between an inferior court and a superior court, whose jurisdiction, from the very necessity of the case, attaches *only on the happening of a particular external event*, viz, the *bankruptcy* of a suitor in the inferior court; it matters not, whether as plaintiff or as defendant. Courts do not *take judicial notice* of the *death* of a party, whether plaintiff or defendant. That is equally an external fact to be brought to their notice. Neither are courts required to take judicial notice of the *bankruptcy of parties*, whether plaintiff or defendant. *But the parties litigant* are bound to take notice of both such external facts, at their peril.

Most of the authorities treat a bankrupt as *civilly dead*,

and require his assignee to be substituted, whether the bankrupt was a plaintiff or a defendant. Others only require the assignee to be made a party where the bankrupt was a plaintiff. But the rule must be the same in both cases, and for the same reason. Now, as a judgment against a *dead man* is void, so, by analogy, a judgment against a bankrupt, without making the assignee a party, is equally void; that is, so far as it relates to all the property, the title to which has been vested in him by law, whether it be incumbered by mortgages and other liens, or not. Nothing, upon principle, can exceed the absurdity of a *decree to foreclose a mortgage, which forecloses nothing.* It may be regarded as a universal rule, in legal proceedings, that he who becomes *the actor* in any proceeding, is bound to make the proper parties in the beginning, and to continue to make the proper parties, from time to time during the proceeding; to make all the proofs, and to take all the legal steps necessary to accomplish the end in view; otherwise, the proceeding will be fruitless and void.

Now, after the bankruptcy of the mortgagor, in the suit to foreclose the mortgage the mortgagees were as much *the actors* as they were in the beginning. Their proceeding was a suit in equity, in a court of equity—one whose machinery is flexible, and specially adapted to meet exigencies arising in the progress of a suit, from the happening of external events, such as the bankruptcy of a party defendant. They had full knowledge of the bankruptcy of the defendant, McClure; that he was civilly dead, or, at least, that he had ceased to have any further interest in the property against which they were proceeding, and that his whole title therein had been transferred to his assignee in trust for his creditors. *They were not bound to continue that proceeding* at all. In fact, they were positively *prohibited* by the bankrupt law from proceeding, *until after the discharge of the bankrupt.* As actors, they had a simpler and a more summary remedy; and that was, to go into the bankrupt court, prove heir debt there, and then to obtain from that court an order for the sale of the mortgaged property. But

if they refused to do that, and chose to continue their proceedings already commenced, then, *as actors* in that suit, they were bound by every legal analogy, at least, to bring in the assignee in bankruptcy of the defendant, and to make *him* a party defendant in that suit; or to obtain authority from the Bankrupt Court to go on. After the bankruptcy of the defendant they were asmuch bound to make his assignee a defendant, before they could proceed further, as they were to make the mortgagor a defendant at the beginning of their suit. As the mortgagor was not bound, in the bebeginning, to become a dendant to that suit until the suit was brought and he was made so by the mortgagees, neither was his assignee in bankruptcy bound to do so after his bankruptcy, and for the same reason. As to that suit *he was not a party.* He was *passive* in reference to it, and he had a right to remain so, like the executor or administrator of a deceased defendant, until he was brought into court and made a party defendant by those who were the self-constituted and voluntary *actors* in the continuance of that proceeding. But they pursued neither of these courses, and they must therefore suffer the consequences of their folly in this action of ejectment.

As an original question, the true rule would be to hold all proceedings in the State or Territorial courts, unfinished at the time of the bankruptcy of a party thereto, to be abated or suspended by the fact of such bankruptcy, until revived and continued by the permission or authority of the bankrupt court, after making the new and proper parties, plaintiffs or defendants. But if it is too late now to hold that doctrine, then the only safe rule, consistent with legal analogy, is the rule for which we contend. Besides, it has the merit of being the only rule which can bring order out of confusion, and harmonize the conflicting jurisdictions and decisions of the courts in regard to the further prosecution of proceedings pending in the State and Territorial courts at the time of the bankruptcy of a party, plaintiff or defendant.

The same rule must be applied in all courts, and in all

cases *by* or *against* the assignee of the bankrupt, in regard to proceedings pending therein at the time of the bankruptcy of a party, plaintiff or defendant therein, afterwards represented by the assignee. It is not denied, that in a case where the bankrupt was plaintiff, the assignee must come in and make himself a party to the suit. Now, why is this? Simply because, as we have said, he thereby becomes *the actor* in the case. For the same reason it is equally clear that in a case when the bankrupt was a defendant, the plaintiff, who wishes to continue his proceedings after the bankruptcy of the defendant, must make his assignee a party to the proceedings. If this be true, then it follows that for this reason, also the decree of foreclosure in this case and the sale under it were inoperative and void; and that consequently the defendants in error could derive no benefit from them in their action of ejectment to recover the mortgaged premises.

THIRD ERROR. It erred in holding that the appellees (the defendants in error) were properly permitted to recover in the court below, (the District Court,) *upon their mortgage alone;* and that "this results *necessarily* from the nature of the mortgagee's estate, and the relation of the assignee (in bankruptcy) thereto," notwithstanding the bankruptcy of McClure, and the fact that his whole estate was in the hands of the bankrupt court; that they had not proved their debt therein, nor obtained the authority of that court to proceed thereon, nor made his assignee a party to their bill to foreclose their mortgages; and that from the beginning to the end of their proceedings they had totally ignored the bankrupt court and its exclusive authority and jurisdiction under the bankrupt law.

The error of the court on this point, as matter of evidence in the action of ejectment, has already been shown by the authority cited in support of the first error.

From the *absence* of the *additional evidence* required in an action of ejectment brought on a mortgage, and from the fact that the majority of the court nevertheless affirmed

the judgment of the District Court, we are justified in inferring that they meant to be understood *literally*.

If, however, the court is to be understood merely as holding that the mortgagees were entitled to recover on their mortgage-title in the action of ejectment, notwithstanding the bankruptcy of the mortgagor and the other facts specified in this assignment of error, then we insist that the court erred for the reasons set forth in the dissenting opinion of Judge Belford, which need not be repeated here.

See Record, pp. 82 to 85.

To the same effect we also submit what is said of the bankrupt act of 1867 by Judge Longyear on this subject in 8th Bankruptcy Register, page 392, &c., in the case of Phelps *v.* Sellick. He there lays down these propositions:

"2d. That all of the estate and property of the bankrupt, and all his right and title to and interest in the property, whether incumbered or unincumbered, are *in custodia legis*, and under the *sole* and *exclusive jurisdiction* and control of the bankruptcy court in which the proceedings are had pending the proceedings, from the filing of the petition for adjudication to the close of the proceedings.

"3d. As a result of the second proposition, that no portion of the estate or the title thereto, or any interest therein or charge thereon can be sold, transferred, prosecuted, or enforced, or in any manner interfered with, except under the direction and by the authority of the bankrupt court, and in all respects subject to its jurisdiction and control.

"4th. That recognizing the express provisions of the act in that regard, as well as the dictates of simple justice, all valid liens and incumbrances are recognized and preserved to their full extent and purpose by the bankruptcy court; but that, as a result of the second and third propositions, such liens and incumbrances can be enforced only by direction and authority, and under the jurisdiction and control of that court.

"5th. That any attempt to enforce such liens and incumbrances, pending the bankruptcy, by the process of any

other court, *or by any authority whatsoever*, without leave of the bankruptcy court first obtained, are in contempt of its jurisdiction and authority, and without any validity whatever, and on application will be restrained, or, if completed, will be set aside.

"6th. That it is competent, however, for the bankruptcy court to treat such process and proceedings as valid and binding upon the estate and persons interested therein; and that it will do so upon application of the lien holder, and a showing by him that the estate and the other creditors will suffer no injury thereby.

"7th. That all the creditors of the bankrupt, secured as well as unsecured, become and are at once, by virtue of the bankruptcy, parties to the proceedings, and they and their debts are thereby brought under and subject to the sole and exclusive jurisdiction and control of the bankruptcy court, and that such jurisdiction and control exists and may be enforced as well before as after proof of debt.

"8th. That the only difference between a *secured* and an *unsecured creditor*, is that relating to the fund or assets to which they are entitled to resort for payment, *the former* being entitled to resort to a particular portion of the fund or assets, and to be paid in full, if the proceeds of such fund or particular portion is sufficient for that purpose, to the exclusion of all others; while *the unsecured creditor* can look only to the general assets, and must share the same equally with the other unsecured creditors.

"9th. There is no difference whatever between a secured and an unsecured creditor, as regards the mode or the proceedings necessary, under the bankrupt act, by which they may be placed in a position to enforce their respective rights; that is to say, a secured creditor has no greater or better right to proceed against or receive payment from the particular fund or assets, upon which he has a lien, without the necessary preliminary steps of proving his debt in the bankruptcy than an unsecured creditor has to proceed against and receive payment from the general assets, without such proof."

The learned judge then says:

"These propositions are so well founded in principle,

are so inevitable as logical deductions, that they hardly need argument or authority for support."

The following selected cases fully sustain them:

Ex parte Christy, 3d Howard, 312, *et seq.;* Norton's Assignee *v.* Boyd, 3d Howard, 435; Peck *v.* Jenness, 7th Howard, 624; McLean *v.* Rockey, 3d McLean, 235; *In re* Vogle, 3d N. B. R., 46; *In re* Kerosene Oil Co., 3d N. B. R., 31; *In re* Wynne, 4th N. B. R., 5; *In re* Mallory, 6th N. B. R., 32; *In re* Magilton, 7th N. B. R., 294; Jones *v.* Leach, 1st N. B. R., 165, quarto; *In re* Stansel, 6th N. B. R., 183; Sampson *v.* Burton, 6th N. B. R., 403, 407; *In re* Iron Mountain Co,, 9th Blatchford, 320; *In re* Brigeman, 1st N. B. R., 59, quarto; *In re* Bigelow, *Id.*, 186; *In re* Lambert, 2d N. B. R., 138, quarto; *In re* Vogle, *Id.*, 138; Davis *v.* Carpenter, *Id.*, 125; *In re* Ruhle, *Id.*, 175; *In re* Bowie, 1st N. B. R., 185; Lee *v.* Savings Institution, 3d N. B. R., 53; *In re* Rosenburg, *Id.*, 33; *In re* Snedecker, *Id.*, 155; *In re* Frizelle, 5th N. B. R., 122; *In re* Insurance Co., *Id.*, 43; *In re* Anderson, *Id.*, 145, 162; *In re* Lady Byron Mining Co., *Id.*, 252; *In re* Mallory, 6th N. B. R., 22; Bromley *v.* Smith, 5th N. B. R., 152; Smith *v.* Kehr, 7th N. B. R., 97; *In re* Cook, 3d Chicago Legal News, 410; *In re* Haake, 7th N. B. R., 61; Williams *v.* Benedict, 8th Howard, 107; Wiswold *v.* Sampson, 14th Howard, 52; Peale *v.* Phipps, *Id.*, 368; Taylor *v.* Caryl, 20th Howard, 583; Freeman *v.* Howe, 24th Howard, 450; Buck *v.* Colbath, 3d Wallace, 334; Stewart *v.* Hines, 6th N. B. R., 416; *In re* Pacific R. R. Co., 11th Nat. Bankrupt Reg., 193, 201, 202.

We also make the point:

That, under the provisions of the bankrupt law of the United States, after the bankruptcy of a mortgagor of real estate, an action of ejectment as at common law can no longer be maintained for the recovery of the mortgaged premises by the mortgagee. 1st. Because it is a *legal action.* 2d. Because the WHOLE LEGAL TITLE to the mortgaged premises has been vested by operation of that law in the assignee in bankruptcy, subject only to the *lien*

of the mortgage. 3d. Because by that law (which is the supreme law of the land) a mortgagee, after the bankruptcy of the mortgagor, is treated only as a *lien creditor*, or as having "a provable debt, and not as holding the the *legal title* to the mortgaged premises, which by that law is vested in the assignee. 4th. Because by that statute, the law of courts of equity in regard to the *real relation* between a mortgagor and mortgagee, with reference to the mortgaged premises, has been *enacted into positive statute law*, and that thereby the "*legal* fiction" by which the mortgagee was regarded as holding the legal title to the mortgaged premises, has been abolished, at least during the pendency of proceedings in bankruptcy, as against the assignee and those holding under him or defending under his title, as an outstanding title.

By the 14th section of the bankrupt act of March 2, 1867, it is enacted that:

"As soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee ALL THE ESTATE, *real and personal*, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law *shall vest* THE TITLE *to all such property and estate, both real and personal, in the assignee*, although the same is then attached on mesne process as the property of *the debtor*, and shall dissolve any such attachment within four months next preceding the commencement of the bankruptcy proceedings:" * * * And that "the assignee shall, within, six months cause the assignment to him to be recorded in every registry of deeds or other office within the United States, *where a conveyance of any lands owned by the bankrupt ought by law to be recorded.*" (14 U. S. Stat. at Large, pp. 522, 524.)

Section 11 provides that a voluntary applicant for the benefit of the bankrupt act shall annex to his petition "a schedule containing a full and true statement of all *his debts*, and, as far as possible, *to whom due*, also the *nature* of each *debt or demand*, and a statement of any *existing mort-*

gage, pledge, lien, property, or collateral OR OTHER SECURITY GIVEN FOR THE PAYMENT OF THE SAME; and shall also annex to his petition an accurate inventory, verified in like manner, of ALL HIS ESTATE, BOTH REAL AND PERSONAL, assignable under the act, describing the same and stating where it is situated, and whether there are any, and if so, WHAT INCUMBRANCES THEREON." (Ib., p. 521.)

The 14th section also provides that "the assignee shall have authority, under the order and direction of the court, to redeem or discharge *any mortgage*, or conditional contract, or pledge, or deposit, *or lien upon any property, real or personal*, whenever payable, and to tender due performance of the condition thereof, or to sell the same, *subject to such mortgage, lien*, or OTHER INCUMBRANCE." (Ib., p. 523.)

The 20th section also provides that, "When a creditor has a *mortgage* or pledge of real or personal property of the bankrupt, or a lien thereon, for SECURING *the payment of a debt owing to him from the bankrupt*, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or *the creditor* may release or convey HIS CLAIM to the assignee *upon such property*, and be admitted to prove his whole debt. *If the value of the property exceed* the *sum* for WHICH IT IS SO HELD AS SECURITY, the *assignee* may release to the creditor the bankrupt's right of redemption therein, on receiving such excess; or he may sell the property SUBJECT TO THE CLAIM of the creditor thereon: and in either case *the assignee* and the creditor, respectively, shall execute all DEEDS and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove *any part* of his debt." (Ib., p. 526.)

"The equity doctrine," says Chancellor Kent, "is, that *the mortgage is a mere security for the debt*, and only a chattel interest; and that until a decree of foreclosure, the *mortgagor continues the real owner of the fee.* The equity of redemption

is considered to be the real and beneficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and *alienable by deed*, precisely as if it were an absolute estate of inheritance at law. *The courts of law have also*, by a gradual and almost insensible progress, *adopted these equitable views* of the subject, which are founded in justice and accord with the true intent and inherent nature of every such transaction. *Except* as against the mortgagee, the *mortgagor while in possession* and before foreclosure, *is regarded as the real owner* and a freeholder, with the civil and political rights belonging to that character; whereas the *mortgagee, notwithshanding the form* of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt. This is the conclusion to be drawn from a view of the English and American authorities." (4 Kent's Comm., 10th edition, p. 182, marg., p. 159, 160.)

Thus it appears that Congress, by positive enactment in the bankrupt law, has treated a mortgagee of real estate simply as a "creditor;" and has again and again defined his mortgage as a mere "security for debt," as a "lien," as an "incumbrance," as a "claim;" and at the same time, (if words have any meaning,) "has vested the TITLE" of the mortgaged property (as contradistinguished from "an incumbrance thereon") in the assignee in bankruptcy, and in full property and ownership, subject only to the mortgage as an "incumbrance thereon." It is placed simply in the same category with "liens," and is treated and regarded throughout, as neither more nor less than a "lien," an "incumbrance," a "security for the payment of debt." In that statute, common sense has triumphed, at last, over antiquated legal forms, and, as we have already seen, the doctrine of equity, in regard to the nature and character of mortgages, has become positive statute law. If this be so, then it follows that the mortgagees, after the bankruptcy of the mortgagor, had no "legal title" on which to base an action of ejectment; that, on the contrary, the "legal title" was vested by positive law in the assignee in bank-

ruptcy; and consequently that the defendant, whether in possession as his tenant or as a "mere stranger," had a right to invoke that legal title, and to hold it up as a shield for the defense of his possession.

The late case of *Doe* v. *Childress* in this Court, reported in 21 Wallace, U. S. R., p. 642, at first view might seem to be in conflict with the doctrines maintained in this argument.

But that case was entirely different, and may be readily distinguished from this. It was an action of ejectment, brought by an assignee in bankruptcy against the tenant of *an innocent purchaser at a judicial sale*, made on a judgment obtained under the lien of an attachment, levied more than four months before the bankruptcy of the defendant therein. The assignee did not intervene, nor did he take any steps to have the attachment dissolved; but he stood by and allowed the sale to take place, without objection, and the property to be purchased under the judgment by an innocent purchaser. From the nature of the case, *the plaintiff in that suit could not make the assignee in bankruptcy a party defendant.* He was therefore guilty of no laches, except so far as he failed to obtain the authority of the bankrupt court to proceed in the case, after the bankruptcy of the defendant therein. If *he* was in default in that respect, the *assignee* was equally so, in not invoking the authority of the bankrupt court to arrest the proceeding in the State court. No fraud was shown in the case, and under these circumstances this court held, that as an *actor*, he could not recover the property. It is not expressly placed upon the ground of equitable estoppel, but it was essentially a case of that kind:

But in this case, on the contrary, the action of ejectment is *brought by the delinquent party*, or at least by the *more* delinquent party, to take the possession of the premises in question out of the custody of the law. As mortgagees they seek to recover, not by virtue of their purchase at the sale under the so called foreclosure, but "solely on their

mortgage title," notwithstanding all the other facts in the case.

After the bankruptcy of the mortgagor, during the pendency of their suit to foreclose their mortgages against him —after full notice of that fact, which they had both in fact and in law, they took no steps to make his assignee in bankruptcy a party defendant, as they could have done, and as they ought to have done, according to the ordinary rules of the equity practice. They were not obliged, as we have already said, to continue their foreclosure suit. They could have gone into the bankrupt court, have proved their debt there, and have obtained a summary order for the sale of the mortgaged premises; but they did neither of these things. In a spirit of lawless recklessness, not in harmony with the usual cautious conduct of cut-throat moneylenders at 3 per cent. a month, they set all law at defiance, both equity law and bankrupt law. They took a decree of foreclosure in hot haste, in violation of the express prohibition of the 21st section of the bankrupt law, then sold the property and bought it in at their own sale, and afterwards turned round and brought this action of ejectment to take the premises out of the hands of the assignee, an officer of the law, holding possession by his tenant the defendant in this ejectment. The only delinquency of the assignee (if such it may be called) has been, that he took no active steps to arrest them in their mad career, but confidently relying upon the law to protect him, as its officer, has quietly bided his time and stood passively on the defensive.

The two cases are therefore entirely different, and, as we have shown, must be determined by entirely different principles.

We therefore confidently submit that in this case it was the duty of the plaintiffs, in the ejectment suit, to show that they had the consent of the court in bankruptcy to proceed in their ejectment suit. This was an affirmative part of their case, which must be made to appear; and, as they did not show it, the District Court erred in allowing them to proceed and in entering judgment in their favor.

But it may be said that the bankruptcy proceedings *in re* McClure were commenced more than one year *before their ejectment* suit, and that there is nothing to show that the estate of the bankrupt at the time of the beginning of the ejectment suit was not fully wound up and settled and the assignee discharged.

See Printed Record, page 71.

As a matter of fact this was not so, but they cannot make this objection now. They should have made it at the time the proceedings in bankruptcy were offered in evidence, and having failed to make it then, when it could have been instantly obviated, they are precluded from making it now. But if such were the fact, it was an affirmative part of their case after the bankruptcy was proved, and cannot be presumed.

FOURTH ERROR. It erred in holding that, "where an estate is assigned, (in bankruptcy,) subject to mortgage, it ought not to be said *in any case* that, as *matter of law*, (nothing being shown as to the fact,) the assignee has either the actual or *constructive* possession; and that, as "in the present case, the appellant (the plaintiff in error) *had not in any way connected himself* with the assignee, (in bankruptcy,) nor shown even that the assignee had ever assumed, or attempted to assume *the possession* of the premises;" he, as a defendant in the action of ejectment, could not defend his possession under the outstanding title of the assignee in bankruptcy, without such preliminary and affirmative proof.

This part of the opinion of the court is triumphantly answered by Judge Belford in his dissenting opinion. (See Printed Record, p. 84.)

But if it were actually necessary, the answer to it might be as successfully placed upon other grounds.

Admitting, for the sake of argument, the truth of the legal proposition laid down by the majority of the court, the question still remains: Upon whom was the burden of proof, at the trial, to show "the fact" that the assignee in

bankruptcy *had* or *had not* assumed the possession, actual or constructive, of the premises in question? Was it on the defendant to show that he *had;* or was it on the plaintiff, in reply, to show that he *had not?*

Ordinarily, when title to property is shown, *prima facie*, to be in a party, the presumption of law is that possession of it, either actual or constructive, follows his title, and this presumption must prevail until the contrary is shown. In this case the title of the assignee in bankruptcy was shown by the defendant. It was set up and relied upon by him in defense of his possession. The legal presumption therefore was, and is, (unless assignees in bankruptcy are exceptions to the ordinary rule,) that the assignee was constructively in possession by the defendant until the contrary was shown. But the plaintiff, in reply, offered no proof to the contrary, and therefore the ordinary presumption must prevail. If so, then, by the admission of the court, the action of ejectment could not be maintained against the defendant. (Printed Record, p. 76.)

But it is submitted that the proposition is not true in point of law. If true, it would make an assignee in bankruptcy an exception to the ordinary rules of law. It would cause his *title* to the estate of the bankrupt, evidenced by a solemn deed and duly recorded by him, unlike that of others, to be dependent on the *fact* of his *possession* of it, and it would deny to him the benefit of the ordinary presumption of *possession*, actual or constructive, arising from *title alone.*

The allegation that the defendant "had not *in any way connected himself with the assignee,*" was equally a mistake in point of fact.

The bankrupt act (section 11) requires that the petitioner "shall also annex to his petition an accurate inventory, verified in like manner, [that is, by oath before the court, &c.,] of all his estate, both real and personal, assignable under this act, describing the same and stating where it is situated," &c. By the record of the bankruptcy proceedings in the case of McClure, given in evidence by the defendant, he showed that the bankrupt, in obedience to this

provision of law, had reported him as debtor to his estate for rent of the premises in question, due up to May 9, 1870, the date of his petition in bankruptcy, (Printed Record, p. 15;) and that afterwards, on the 2d day of August, 1870, the assignee in bankruptcy had petitioned the bankrupt court for an order, directed to the defendant Eyster, (among others,) requiring him to pay the rent of the premises occupied by him into the depository of the court, &c., (Ib., p. 24;) and still later it appears, by the record of this case, that the assignee, on the 19th of June, 1871, appeared and signed the defendant's plea, as one of defendant's attorneys to defend the action of ejectment. (See *ante*, p. 6, and Printed Record, p. 3.)

But if such proof of the fact was illegal or insufficient, we have already shown that the defendant was not bound to make any proof on the subject; but that, on the contrary, the burden of making the negative proof of the fact (if necessary to the success of their cause) rested on the plaintiffs—that they did not make it—and that therefore, from their failure to make it, the ordinary legal presumption of the possession of the assignee in bankruptcy under his title must prevail.

FIFTH ERROR. It erred in holding that, notwithstanding the bankruptcy of McClure, as shown by the defendant in the action of ejectment, the plaintiffs therein ought to be allowed to proceed and to recover the premises against the defendant—in the absence of additional proof *by him* that the assignee *had not disclaimed* the statutory title and possession of that part of the estate of the bankrupt which had been devolved upon him by law; instead of holding and requiring the evidence of the fact of *such disclaimer* (if it existed and was available) to be made by the plaintiffs, in avoidance of the outstanding title of the assignee, as shown by the defendant; thereby, transferring the burden of such proof from the plaintiff to the defendant.

This error, like the last, is also a question of the burden of proof, and, like it, turns upon essentially the same prin-

ciples. In fact it is only another form or sequence of the previous error, and it may therefore be disposed of in the same way; and by reference to the authorities cited in support of the first error, which show that the burden of proof is on the plaintiff, and not on the defendant, in the action of ejectment, and that, in the absence of evidence of any fact essential to the maintenance of his action, the defendant must prevail.

On all these grounds, therefore, we claim that the judgment of the Supreme Court of Colorado must be reversed.

JOHN A. WILLS,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT

OF THE

United States.

CHRISTIAN S. EYSTER,
Plaintiff in Error,
vs.
JAMES W. GAFF AND THOMAS GAFF,
Defendants in Error.

No. 134.
October Term, 1875.

Writ of Error to the Supreme Court of Colorado Territory.

Additional argument of plaintiff.

Before entering into the further argument, it might be proper here to anticipate a suggestion that may arise in the minds of the Court, or may be made by the counsel for the defendants in error, and it is this: What is the practical use and value of reversing this judgment? McClure is a bankrupt, his property has been sold under process of a Territorial court, and sold for a less sum than the amount of the notes and interest on them secured by the mortgages. To this, and all similar suggestions, I answer: True it is

McClure's property, has been sold from him by process out of a Territorial court; and he is a bankrupt; but even a bankrupt has, or ought to have, some rights that a court will respect.

When the foreclosure suit was commenced against McClure in December, 1868, he filed an answer to the bill (which answer by an inadvertance was not made a part of the record) and he defended himself and his property against the payment of the three notes, for the sum of six thousand dollars each, on the ground that they were obtained from him by a fraudulent contrivance between George W. Lane and defendants in error in this suit.

On the first of December, 1869, the defendants in error, by their agents, obtained possession of the three store houses on Larimer street, in Denver, covered by their mortgages, as set forth in the petition of John Meckling (see printed record, page 24,) which property was then rented to good tenants, for the sum of seven hundred and twenty dollars per month. When McClure became and was adjudged a bankrupt on the 10th of May, 1870, his property as well as the defence of it devolved on his assignee in bankruptcy.

The assignee was not brought into the Territorial court as a defendant in the foreclosure suit. He was in the possession of the property in controversy in this suit by his tenant, the plaintiff in error, and he well knew that under the bankrupt law, and the decisions of the courts thereon, before that possession could be disturbed by a secured creditor, that creditor must first prove his debt according to the prescribed forms, and as he was not made a party by the actors in the proceedings, he rested upon his possession as the custodian of the court, and he relied upon the law to protect him, and aid him in that defence which he believes to be not only a good, but a meritorious one. And this he had a right to do. 14th Wallace, Traders' Bank *vs.* Cleveland, 95.

He knew the defendants in error must come into the bankruptcy court and prove their claim, and he believed that he could make his defence as successfully, and more econonomically there than he could in the Territorial court. McClure was a bankrupt, and he abandoned the active defense of the case.

Again, if the court will turn to the Master's Report, pp. 51 and 52, your honors will see that the master reported the whole amount of the notes with their interest due on the 29th of June, 1870, and allows no credit for the rent collected by the defendants in error or their agents at $720 per month, from December 1, 1869; and the decree is filled up for the same amount. see printed record, page 57, when on that day the defendants in error, or their agents, had in their pockets *five thousand* and forty dollars, which they had collected as rent, and refused to credit on the decree.

Again, the sale was made by the special master on the 27th day of August, 1870, after they had collected two months more of rent, for which they gave McClure no credit—charging him with the full amount of the decree, and reporting a balance due from him to the Gaffs, of $11,-310.71, when they had in their hands, of McClure's money collected as rents, six thousand, four hundred and eighty dollars.

These defendants in error, by themselves or their counsel, did all of this, and the record shows it, and if this is not a fraud, we must confess we do not know the meaning of the term. This cannot be charged to mistake, a man can't well have six thousand dollars in his pockets, in the Rocky Mountains, and not know it. It was a characteristic close up of the three per cent. a month extortion. McClure was a bankrupt, he was down and these men were determined to wrest from him the last cent he had.

They are now and have been, ever since the first of De-

cember, 1869, in possession of property that then rented for seven hundred dollars per month, and is worth more now than it was then, for their original investment of thirty-eight thousand dollars, and yet they would complain because it don't bring them quite 3 per cent. per month.

It was to compel these men to come in and properly prove their debt that the assignee in bankruptcy defended this suit.

It was to get proper credit for the rents then collected and not credited. It was to make just defence against those three notes for six thousand dollars each, which in three years, four months and twenty-seven days, had by extortionate interest increased to forty thousand and eighty-six dollars, that this action of ejectment was resisted by the assignee in Bankruptcy, as well he might do. It was to compel these parties to come into the proper Bankruptcy Court, to prove their debt, show what was its consideration, and what payments or credits should be allowed upon it.

Besides the sale of the property was made upon a decree that was invalid, as we say, and there were no bidders for the property but the defendants in error, and it sold for less than its real value.

These, we submit, are substantial and valid reasons why this controversy should not be regarded as a mere matter of form and technicality, but as one of real substantial justice between the bankrupt and his other creditors, on the one side, and the defendants in error, on the other.

This decree in the foreclosure suit against McClure was taken for many thousands of dollars more than was due, in the hot haste of the defendants in error or their agents, to crush him.

Besides, we have been taught to believe that this court decides cases on principle and not upon amounts and results. When Congress enacted the Bankrupt Law of March 2,

1867, they intended it as a system, they meant it to be a complete and uniform system for the administration of the assets of insolvent debtors, and they entitled it, "*A uniform system of Bankruptcy throughout the United States.*"

Subsequent legislation has shown, that the law making power intends that system to be a permanent one. To your honors belong the right and duty to expound it and take care that it is administered in accordance with the prescribed rules, with the making of which, and the proper forms, your honors were specially charged by 10th Section of the Act. A bad precedent may do great injustice, and embarrass the administration of the law for many years to come, and, in the end, after it may have wrought incalculable mischief, must be corrected.

After property has once by operation of law been vested in the assignee in Bankruptcy, if State Courts are permitted in utter disregard of the Bankrupt law and its rules, and forms as prescribed by this court, to wrest it from the custody of the Federal courts, then there must be an end to the uniform administration of the law. The numerous independent courts of thirty-eight independent States will so innovate upon its wise provisions, that it will cease to be what Congress intended it to be, an exclusive system, and its attempted uniform administration will be impracticable, and attended with just such doubts, difficulties and embarrassments as are spoken of by Judge Story in ex parte Christy.

In Doe *vs.* Childres, 21 Wallace, 642, this court says: "When the power of a court to proceed in a suit is subject to impeachment, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof, &c."

In that case the property, the *subject* of controversy was attached by the process of the State court ten months before

the bankruptcy of the defendant, and at the time of the bankruptcy was in the actual, manual custody of the State court by its officer the sheriff. Your honors say, "The Court of Chancery of Tennessee having *jurisdiction of the subject* of the proceeding in the attachment suits, and no defense being interposed by the assignee, and no measures having been interposed to arrest the proceedings in the State court in the absence of fraud we are of opinion that the title made by such proceedings is a valid one."

And, under the facts in that case, that might well be; but in the case under discussion the Territorial court in chancery had not obtained jurisdiction of the property in question.

They had not appointed a receiver, a sequestrator, nor in any way interferred with the property. It was in the quiet and peaceable possession of McClure from the commencement of the suit till the day of filing his petition in bankruptcy, when *by operation of law* it passed, and was vested in the bankruptcy court, and through that court passed into the custody and possession of the assignee.

The mortgagor were not suing for the property; they were suing *for their money*.

Sheldon vs. Sill, 8th, Howard U. S. R., p. 441.

In the case now under discussion, the assignee had not only the constructive, but he had the actual possession. When he had the property in his possession and was gathing and pursuing the assets in his own way, he was not bound to go into Territorial court—14, Wallace 95.

The 21st section of the act does not give him the right to go there—it was for the mortgagor. The assignee was in possession, he believed that his possession could not be disturbed without the consent of the court in bankruptcy, and he knew that such consent could not lawfully be obtained until after the defendants in error had proved their debt, and therefore he was rightly passive, and rested on his defence *to be* made there.

We now submit this proposition.

On a proper petition, McClure was duly adjudged a bankrupt by the Supreme Court of Colorado, on the 10th of June, 1870. On the 4th of June, 1870, John Meckling was duly appointed his assignee, and accepted the appointment, and on the 9th of the same month, the register in bankruptcy of that court executed to him a deed in due form of law for the property—Printed record, pages 20, 21 and 22.

That the estate, and the right and title of McClure in the premises in question, then vested by operation of law in Meckling, his assignee, as the lawful agent, and custodian of the Bankruptcy court, is a proposition so well established that it needs no citation of authority or argument to support it. Now then—suppose the assignee had voluntarily entered his appearance, or been brought by process of the Territorial Court, as a defendant into the foreclosure suit, and that he had confessed, or allowed a decree to be made for foreclosure in the case, or that a decree had been made against his best defence. How could that decree be *enforced* against the estate of McClure, then in the *custody* of the court in bankruptcy, without its consent.

The assignee could not consent to a sale. He is the mere agent of the court in bankruptcy, and he is the assignee for all the creditors, as well as for the bankrupt in his residuary right. The court could not consent until the defendants in error had *proved* their claim, for it must be done on petition, and a party can have no status in a bankruptcy court and proceeding, until he has first *proved* his debt.

It is analagous to a judgment creditor, who had issued a *sci fa* to revive his judgment, and pending the final judgment on the *sci fa*, the defendant becomes bankrupt. It cannot be pretended, that on a judgment obtained on such *sci fa*, after bankruptcy of the defendant, that the plaintiff could issue an execution and sell the property then in the custody of the bankruptcy court.

In Wiswold vs. Sampson, before cited, the property was in the hands of the receiver of a State Court, and a sale of it made by the marshal on a judgment in the District Court of the United States, was held by this court to be invalid, and to confer no title. In Taylor vs. Caryl, 20th, Howard 583, the property was in the hands of the sheriff of a State Court, and this court held that a sale of it made by the marshal on a judgment in an admiralty proceeding conferred no title on the purchaser.

If these propositions are true, then the District court of Arapahoe county was in error in allowing the evidence of the master's sale and deed to be read in evidence, as well as in their finding and judgment against the defendant, and the Supreme court erred in sustaining the judgment of the court below.

We submit, that if the sale under which the defendants in error claim in this case is a valid sale, then the 20th section of the Bankrupt Law is of no force, for the assignee is deprived of the right to redeem the property.

He cannot redeem without paying the alleged claim, and if he should undertake to pay a claim until after it is proved and allowed, he does it without authority of law, and it cannot be allowed to him in the settlement of his account, out of the funds of the estate.

The defendants in error had no right to proceed on their mortgage, to disturb the possession of the assignee until they had first proved their debt.

In Ex Parte Christy it is said by Mr. Wilde, for the City Bank, on page 298:

"The substantial question before this court is, whether he who has never proved his debt, never came under the bankruptcy, can be dragged into the District court, sitting as a bankrupt court, and exercising summary jurisdiction without appeal; his writ of seizure and sale annulled, the judg-

ment of the State court vacated, the sale set aside, and his mortgage declared null and void, though the Supreme court of the State have declared them good and valid."

The Supreme court, on page 315, answers:

"If this argument were well founded, it would be sufficient to say, that the case would then fall within the concurrent jurisdiction given by the 8th section, already cited, and therefore not available for the City Bank. But we do not so interpret the language. When creditors are spoken of 'who claim a debt or demand under the bankruptcy,' we understand the meaning to be, that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might select, *whether they have a security by way of pledge or mortgage therefor, or not.*"

And, to make this matter *certain*, Congress provided as follows, in the 22d section of the act of 1867:

"To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper register or commissioner setting forth the demand. The consideration thereof, whether any, and what securities are held therefor, and whether any, and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant," and the Supreme Court of the United States have prescribed the form required for this proof, form No. 21.

Section 20 of the same act, provides how secured claims shall be liquidated, either by agreement with the assignee, or by a sale of the pledged or mortgaged property by order of the court, but the assignee cannot agree, nor can, nor will the court order a sale for such a purpose until the debt

is proved in bankruptcy, so that the assignee and the court may see what it is.

Proving the debt is an absolute prerequisite to any proceeding in the matter, and the creditor cannot lawfully take any step against the estate of the bankrupt, pending the bankruptcy proceedings, till his claim is proved.

The creditor may rely upon the lien which the State law, or the act of the debtor gives him, but he can take no steps in the State courts to enforce it, pending the bankruptcy proceeding. If he does attempt it, he must first show that he is in a condition to do so, by showing the consent of the bankruptcy court, or a winding up and close of the bankruptcy proceedings.

In Phelps *vs.* Selliek, 8th Bankruptcy Register.

Judge Longyear in his 9th proposition, on page 393, says:

"There is no difference whatever between a secured and an unsecured creditor. as regards the mode of the proceedings necessary under the bankruptcy act, by which they may be placed in a position to enforce their respective rights, that is to say, a secured creditor has no greater or better *right to proceed against*, or receive payment from the *particular fund or assets upon which he has a lien*, without the necessary preliminary step of proving his debt in the bankruptcy, than an unsecured creditor has to proceed against and receive payment from the general assets without such proof."

This, he says, is so well settled, that it does not now need either argument or authority to support it. See also, Davis *vs.* Anderson, 6th N. Bankruptcy Register, 145; *in re.* Thomas Morrison, 10th N. B. R., 105.

In Peck et al *vs.* Jenness et al, 7th Howard, 612. The case was on an attachment suit, and was similar to the case of Doe vs. Childress, before referred to.

This court then held that the attachment created a lien

on the property attached, which was protected under the bankrupt law of 1841, and that the subject of the suit being in the custody of the State Court, they might proceed against it by a *proper judgment adapted to the circumstances of the case.*

Mr. Justice Grier says:

"The District Court has exclusive jurisdiction of all suits and proceedings in bankruptcy," but the suit pending befor the court of common pleas is not a suit or proceeding in bankruptcy, and then he proceeds to say, that the court of common pleas having aquired jurisdiction over the *persons, and the subject matter of the suit, prior to the bankruptcy proceedings* had power to go on with it, and by a *special judgment, make a final order.*

He then says:

"It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceeding in 'another court.'" * * * *

"It follows, therefore, that the District Court had no supervisory power over the State Court, either by injunction, or the more summary method pursued in this case, *unless it has been conferred by the bankrupt act.* But we cannot discover any provision in that act which *limits* the jurisdiction of the State Court, or confers any power on the bankruptcy court to supersede their jurisdiction, to annual or anticipate their judgment, or wrest property 'from the custody of the officer.'"

This was the language of this court, in refcrence to the bankrupt law of 1841.

In Ex Parte Christy, 3d Howard, page 318, this court says:

"It is further objected, if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify, according to the interpretation here insisted on, it operates, or may operate to suspend all proceedings in the State Courts, either *then pending* or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assignee after the bankruptcy. We entertain no doubt that under the provisions of the 6th section of the act, the District Court does possess full jurisdiction. * * * * * * * * * *
Similar proceedings have been instituted in England in cases of bankruptcy; and they were without boubt in the contemplation of Congress as *indispensable to the practical working of the bankrupt system.*"

These powers were questionable under the law of 1841, and we say, that when Congress enacted the bankrupt law of 1867, in the light of these decisions to make the matter clear they made this provision in the 21st section.

"And no creditor whose debt is provable under this act, shall be allowed to prosecute to final judgment *any suit at law, or in equity,* therefor, against the bankrupt, until the question of the debtor's discharge shall have 'been determined.'"

We shall not stop here to enquire whether this prohibition was inserted more for the protection of the debtor, than for that of the jurisdiction of its own courts. It is enough for our argument to know, that it is there, that Congress had the power to put it there, and that, in our judgment it is as much addressed to the State Court, and to suitors in them, as it is to the Federal Courts. If there is any force in the English language, it is an absolute injunction against

all courts, forbidding them, pending proceedings in bankruptcy, and before the question of the debtors discharge is settled, from proceeding to enter final judgment against the bankrupt in any suit at law, *or in equity*. There is no evasion of the force of this injunction.

In the case at bar, the foreclosure suit was pending when McClure was adjudged a bankrupt, and before the question of his discharge was determined, the complainants took a *final decree*, therefore, contrary to the terms of this injunction; and therefore, the decree was a nullity, or the law is without any force or meaning. This cannot be evaded by saying the decree was against the property, for the property was then in the custody of the bankruptcy court; and again, the decree was that McClure pay so much money. It was a decree against him.

But it is said, McClure might have gone into the District Court, and stayed the proceeding; and, as he did not do so, the decree is valid. To this we answer: McClure was then adjudged *a bankrupt*; he was dead to his property, and to all of his former contracts; there was an impassible barrier between him and what he had formerly owned. He did not go into court to prevent the decree. How was the bankruptcy court, or its assignee to know that this was not done by collusion between McClure and the mortgages—especially when those creditors refused to come into the bankruptcy court and prove their debt in the mode pointed out by the law. There was in fact no collusion in this case, but the law was enacted to prevent such collusion, and this court should so hold, in order to prevent fraud that might be thus practiced.

But again, it is said the *assignee* should have gone into the court and resisted the decree. To this we reply, no; and we refer to the language of this court in, Traders Bank *vs.* Campbel, 14, Wallace, p. 95—

correct,) and shall dissolve any attachment on mesne process out of any court, made within four months next preceding the commencement of such proceedings in bankruptcy."

This we contend is the true construction; and when it is taken in connection with section 21 of the act, it demonstrates that Congress meant *exclusive jurisdiction* for their courts in all matters of bankruptcy.

An examination of the case Ex Parte Christy, 3d Howard, 292, to 332, will convince this court that the Supreme court who pronounced that decision were fully impressed with the belief, that when Congress enacted the law of 1841, *if* they *did not* give exclusive jurisdiction to their courts, in express terms, they had *intended to do so.*

After a very careful and elaborate statement of the case, the court says on page 312: "The obvious design of the bankrupt act of 1841, was to secure a prompt and effectual administration and settlement of the estates of all bankrupts within a limited period. For this purpose it was *indispensable that an entire system*, adequate to that *end*, should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independent of all aid and assistance from any other tribunals, over which it could exercise no effectual control." * *

Again the court says:

"From this brief review of these enactments, it is manifest that the purpose so essential to the just operation of the Bankrupt system, could scarcely be accomplished, except by clothing the courts of the United States sitting in bankruptcy, with the most ample powers and jurisdiction, to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required *the end*, they should at the same time have *witheld the means*, by which alone it could be successfully reached."

The court then examines the jurisdictional power con-

ferred on the Federal courts by the 6th section, and on page 315, says, "when creditors are spoken of, who claim a debt, or demand under the bankruptcy," we understand the meaning to be, that they are creditors of the bankrupt, and that debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form, which the creditors might elect, *whether they have a security, by way of pledge or mortgage therefor, or not.*"

On page 318, same case, the court says: "It is further objected, that if the jurisdiction of the District court is as broad and comprehensive as the terms of the act justify, according to the interpretation here insisted on, it operates or may operate to suspend or control all proceedings in the State courts, either *then pending*, or thereafter to be brought by any creditor or person having any adverse interest, to enforce his right or obtain remedial redress against the bankrupt or "his assets after the bankruptcy. We entertain no doubt that under the provisions of the 6th section of the act, the District court does possess full jurisdiction to suspend or control such proceedings in the State courts, not by acting on the courts, over which it possesses no authority; but by acting on the parties." * * * *

To prevent any misunderstanding on this point, and to make it perfectly plain, Congress in the enactment of the law of 1867, inserted the 21st section; and we affirm that in the establishment of a bankrupt system, Congress had such power to act not only on the parties, but on the State Courts.

Again, on page 320, same case, it is said:

"Besides, how is the bankrupt court or the assignee, in a great variety of liens, mortgages, and other securities, to ascertain the just and full amount thereof, after the deduction of all payments and equitable set-offs, unless it can

entertain a suit in equity for a discovery of the debts and payments and set-offs, and grant suitable relief in the premises. The bankrupt is not in his schedule bound to specify them; and if he did, *non constat*, that the other parties would admit their correctness, or that the general creditors would admit their validity and amount."

And here we suggest, that in order to bring all of these matters into the bankruptcy court, it is made the duty of the bankrupt in the 11th section of the act of 1867, to give an exact account of all of those matters. He must now do so, and Congress meant by it, to bring them in for the very purpose that the court might adjudicate, and liquidate and adjust them. Again on the same page it is said:

"If we are told that resort may be had to the State courts for redress, one answer is, that in some of the States no adequate jurisdiction exists in the State courts, since they are not clothed with general jurisdiction in equity. But a stronger and more conclusive answer is, that Congress did not intend to trust the working of the bankrupt system solely to the State courts of twenty-six States, which were independent of any control by the general Government, and under no obligations to carry the system into effect. The judicial power of the United States is, by the Constitution, competent to all such purposes; and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do."

Again, we submit here that if this language was used by the Supreme court in construing the act of 1841, as to the exclusive jurisdiction conferred by that act, with how much more force can it be applied to the act of 1867, which seems to have been drawn to meet all the objections that were in that case made to that act, the several sections of which seems to have been framed, and drawn so as to

make these several points clear, and free from any doubt or misconstruction.

After contending for, and demonstrating the necessity of exclusive jurisdiction throughout the entire opinion, the court says: page 321.

"The truth is, (as has been already asserted,) that in no other way could the bankrupt system be put into operation, without interminable doubts, controversies, embarrasments and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependant upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges and expenses, could be safely relied on, *when the whole jurisdiction was confided to a single court*, in the collection of the assets; in the ascertainment and liquidation of the liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such times and in such manner as should best subserve the interests of all concerned; in preventing by injunction or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the State tribunals; and finally in "making a due distribution of the asset, and bringing to a close within a reasonable time, the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to public as well as private interests, manifestly dictated to Congress the propriety of vesting in the District Court *full and complete jurisdiction over all cases arising, or acts done, or matters involved in the due administration, and final settlement of the bankrupt's estate; and it is accordingly, in our judgment, designedly given by the* (6) *sixth section of 'the act.'*"

If it be a sound legal maxim, that when a statute which has been construed by the highest legal tribunal of the State which enacted it, is adopted by another State, the former construction is also adopted with it, then we say, that Congress in passing the bankrupt law of 1867, intended to give, and did give to its courts absolute and exclusive jurisdiction, and not only that, but Congress intended to arrest and did arrest, the proceedings of all State courts in suits pending, when the defendant became a bankrupt, pending the proceedings, until the question of the debtor's discharge was determined; for it said:

"21st section. That no creditor whose debt is provable under this act, shall be allowed to prosecute to final judgment, *any suit at law or in equity therefor against the* bankrupt, *until the question of the debtor's* discharge shall have been determined."

Again, further to show the intention of Congress in the bankrupt system of 1867, we may state that, in the case of ex parte Christy, Judge Catron delivered a dissenting opinion, and in it adopted the opinion of Judge Baldwin in the case of *in re* John Kerlin, a bankrupt, page 526, same book.

In his opinion on page 327, he lays great stress on the last proviso of section 2, of the act of 1841, "That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the law of the States respectively." * * * And on this he maintains with great ability, that the State courts have the power, not only to adjudicate on such liens, but to enforce them; and, that if Congress had *intended* to withdraw such power from the State courts, they would and must have done so *in express terms*. Accordingly, we contend, the Congress of 1867,

left that clause entirely out of their act. It is true, such liens were not impaired thereby; but, we contend, that a more speedy and economical remedy was provided in the bankruptcy courts, than the creditor had in the State courts in this, that as soon as the creditor had proved his claim in bankruptcy, the bankruptcy court could at once order a sale of the property pledged for the debt.

On page 330, that able jurist also says:

Congress, *while it had the power, did not in express terms limit*, or in any way *control the State Courts;* and on page 331 he says:

"Every principle established by the Supreme Court in the case of Bronson as well as the protection given to liens by the bankrupt act, would be utterly prostrated, *if a sale by an assignee would disencumber property mortgaged or bound by a judgment.* Again on the same page, he says:

"The 11th section is framed to meet this view of the 3d; by giving power to the court to authorize the assignee to *redeem, and omitting any power to order a sale*, it is manifestly intended merely to put the 'assignee in the place of the bankrupt.'" To meet these very objections and to make the whole matter of exclusive jurisdiction clear, we say Congress inserted in the 20th section the very power to sell which that great judge contended was wanting in the act of 1841, and accordingly this clause has uniformerly been so construed, viz:

"On the application of the assignee, the District Court may order incumbered property to be sold free from incumberance, the lien being transferred to the funds in court."

In re T., R. Stewart, 1st B. R., 278; *in re* Barrow, 1st B. R., 481; *in re* McClelland, 1st B. R., 389; *in re* Columbian Metal Works, 3d B. R., 75; *in re* Salmons, 2d B. R., 56; 1st B. R., 100; Foster vs. Amer et al, 2d B. R., 455, quarto 147; Southerland vs. Lake Superior Canal Company,

9th B. R., 298; in ex Parte Christy, it was urged page 317.

"The jurisdiction of the bankruptcy court is summary, and without appeal."

This was corrected by Congress in the act of 1867, in sections 8 and 9.

The jurisdiction given in the first section of the act of 1867, is given exactly in the words which the Supreme court says in Ex Parte Christe, on page 321, means exclusive jurisdiction.

The assignee in bankruptcy is a necessary party to a bill to foreclose a mortgage given by the bankrupt.

Barron *vs.* Newbury, 1st Bissel, 149.

Lowery *vs.* Morrison, 11th Paige's Chan. Repts., 327.

Coe *vs.* Whitebeck, Id. 42.

McClean *vs.* the Lafayette Bank, 3d McClean, 191.

Thorn *vs.* Deas, 4th Johnston, 84.

Cleveland *vs.* Sedgewick, 7th Paige's Chancery R., 287, Story's Equity Pleadings, sec. 158, 349, note.

In Russel *vs.* Clarke, *et ex.*, 7th Cranch, 69.

(2d Curtis 459.)

C. J. Marshal says: "Assignees in bankruptcy are indispensible parties to a bill against a bankrupt, and persons to whom he conveyed property in trust before he was decreed a bankrupt.

But whether the assignee was a party to the foreclosure suit or not, we say that at the time of the sale by the special master, to the defendants in error, McClure had been adjudged a bankrupt, and the property was then in the care of the assignee in bankruptcy, and the sale thereof to the defendants in error conferred no title on them.

We submit we have now here shown that Congress intended by the bankrupt act of March 2, 1867, that its courts should have a superior and exclusive jurisdiction. The power of Congress to do this is not questioned.

We also submit this proposition, as laid down by Judge Longyear in Phelps *vs.* Sellick, 8th Bankruptcy Register, page 392.

"That all of the estate and property of the bankrupt, whether encumbered or unincumbered, are *in custodia legis*, and under the *sole* and *exclusive jurisdiction* and control of the bankruptcy court, in which the proceedings are had pending the proceedings, from the filing of the petition for adjudication to the close of the proceeding."

Now then, suppose for the illustration, that the assignee should have been brought in as a party in this foreclosure suit, what sort of judgment could the court render, so as to divest the equity of redemption? not that McClure pay the the money, for he is *civiliter mortuous*. Not that the assignee pay it, for he is the mere agent of the court in bankruptcy and dare not pay any money to any creditor until the claim or debt is proved, and not then, without the order of the court; besides, he may be removed in a day by the power that appointed him. Nor could a decree be entered against the court in bankruptcy. Nor could a decree be entered for the sale of the property, for it is in the custody of another court, and that would violate the well settled principle of of Wiswold *vs.* Sampson, and the other cases cited. There is and can be no other safe conclusion, than that Congress intended the holders of secured debts should follow their liens into the bankruptcy court. Such a construction will produce harmony, and a uniform system of administration. Any other theory or hypothesis of the administration of this law, in the language of Judge Story before cited, would lead to interminable doubts, controversies, embarrassments, and difficulties. And for that reason also, the majority of the Supreme Court of Colorado were in error, when they affirmed that in this case the defendants in error might recover on their mortgage alone.

The bankruptcy of McClure vested the title to, and the whole of his estate in the Bankruptcy court, and in its assignee as the agent of the court, so that at the time of bringing the ejectment suit the legal estate in this property was in the assignee, under the control and subject to the administration of the court in bankruptcy, and that possession could not be disturbed without the consent of the bankruptcy conrt first had and obtained.

The exact course of procedure in reference to receivers and sequestrators is pointed out by this court in Wiswald vs. Sampson, 14th Howard, U. S. Rept's page 65. This court says:

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. * * When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to *give him leave to bring an ejectment* or permit him to be examined *pro interresse suo*, 3d Daniels, practice, 1984. We submit that the rules pointed out and fixed in this case, founded as they are upon the just rights of courts, are so clear, and so well established that no further argument or citation is necessary, and that on all points the decision of the District Court of Arapahoe county, and the Supreme Court of Colorado Territory must be reversed.

C. S. EYSTER,
Plaintiff in Error, Pro se.

Supreme Court United States.

OCTOBER TERM, 1875.

CHRISTIAN S. EYSTER,
Plaintiff in Error,
vs.
THOMAS GAFF AND JAMES W. GAFF,
Defendants in Error.

No. 134.

Writ of Error to the Supreme Court of Colorado Territory.

SHELLABARGER & WILSON,
For Defendants in Error.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

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FACTS.

We shall here set out out, separately, only such leading facts as present the questions of error in their main features, and shall, in our argument, state such additional ones as become material in the discussion.

The ejectment suit, upon the record of which these errors are here assigned, for lots 1 to 6 inclusive, in square 98 east division of Denver, was commenced on the 2d June, 1871, by defendants in error in this case against the plaintiff in error, in the District Court of Arapahoe county, (Rec., p. 2,) which was after the deed of the special master of May 29th, 1871, (Rec., pp. 63–64,) had granted to defendants in error whatever estate in said lots could be and were sold under the decree of foreclosure pronounced by said District Court (the plaintiff in error being the judge rendering the decree) July 1st, 1870. (Rec., pp. 57–58.) So that when said ejectment was begun plaintiffs in ejectment had whatever title this deed, under said decree of foreclosure and

sale thereunder, could confer, as well as the title bestowed by the mortgages so foreclosed.

The title of Geo. W. McClure to said lots was derived from the United States under act of Congress by deed of Hall, probate judge, of date August 11, 1865, (Rec., pp. 6–7,) and the validity of such title is not in this assignment of errors controverted, said McClure being the mortgagor in the two mortgages foreclosed in said foreclosure proceeding and the defendant therein. (Rec., p. 33.)

Said proceeding to foreclose was begun, in chancery, in said District Court on 11th December, 1868, (Rec., p. 33,) about seventeen months before said McClure, the defendant in such suit to foreclose, filed, in the Supreme Court of Colorado, his petition to be adjudged a bankrupt, which was 9th May, 1870, (Rec., p. 10,) such proceeding being to foreclose two several mortgages on, amongt others, the said lots, made by said McClure: one to A. M. Clark, and bought by said Gaffs, dated 3d September, 1866, to secure said McClure's note payable to Clark's order, one year from date, for $20,000, with interest at 1½ per cent. per month, dated 3d September, 1866, and the other mortgage to defendants in error, dated 2d February, 1867, securing three notes, of even date with the mortgage, of $6,000 each, to said Gaffs or order, payable at 3, 6, and 9 months from date, with 3 per cent. per month interest. (Rec., pp. 33–39.)

On 26th November, A. D. 1869, (Rec., pp. 50, &c.,) the court referred this foreclosure case to a special master to take proofs of the matters in the bill, state an account, and report to the court. The evidence was taken by the master in 1869 and early in 1870, and on 29th June, 1870, the master made report to the court, finding $69,006 due on the mortgages, the matters stated in the bill to be true, and recommending a decree as prayed in bill. (Rec., p. 50.)

July 1st, 1870, said District Court rendered its decree confirming master's report; finding allegations of bill true,

finding mortgage valid lien on said lots; that default was made in payment; the amount due $69,006; directing payment in thirty days of amount due, and in default that premises be sold by special master, &c., foreclosing all equity of redemption unless redeemed in six months, &c. (Rec., pp. 57–58.)

On the 19th September, 1870, master reports sale made under said order on 27th August, 1870, that he did sell said lots to Thomas Gaff and James W. Gaff, (being defendants in error,) for $59,000, and that a balance was left due on this decree of $11,310.71, and that he had made to purchasers a certificate of purchase, &c., (Rec., pp. 59, 61,) which report was confirmed by court October 27th, 1870. (Rec., p. 63.)

The master's deed under this sale for lands in suit was made 29th May, 1871, (Rec., p. 63–4,) and was confirmed by the court, (Rec., p. 63,) and granted to defendants in error in fee the lands in suit.

The only thing disclosed by the record in the foreclosure suit as to the proceedings in bankruptcy on petition of McClure is the filing of register's certificate, (Rec., pp. 58–9,) which was June 30th, 1870.

McClure's petition to be adjudged a bankrupt was filed in Supreme Court May 10th, 1870, and about 17 months after foreclosure suit was brought, and after much of the evidence was taken on the reference to the master in said foreclosure suit, (Rec., p. 15,) and the amended schedule shown on Record, p. 15–16, was filed 29th July, 1870, after decree of foreclosure. (Rec., p. 16.) Marshal's return of notice is June 4th, 1870. (Rec., p. 18.) John Meckling appointed assignee same day, (Rec., p. 20,) but gave notice of his appointment 30th July, 1870, after decree in foreclosure. (Rec., p. 20.) June 9th, 1870, register assigned to Meckling, assignee, the property of McClure as held by him on date of his petition, 9th May, 1870. (Rec., p. 22.)

On 2d August, 1870, after decree of foreclosure, the assignee, Meckling, filed a petition in Supreme Court in the bankruptcy proceeding of McClure, reciting the two mortgages embraced in above-named foreclosure proceeding; the commencement, object, decree, and reference to a master therein, *making no objection to such decree or order of sale, asking no possession by the bankrupt court of said lots, and only asking that certain rents supposed to amount to about* $5,200, *be required to be paid into court to abide the bankrupt court's order, and said petition by Meckling assents to and recognizes the validity of such decree by complaining that said rents were not credited on such decree.* (Rec., pp. 23–4–5.) McClure was discharged by Supreme Court in bankruptcy, 28th December, 1870. Rec., p. 32.)

In the said ejectment trial, plaintiffs, in opening, gave in evidence the title to said lots of said McClure, and the mortgage of 2d February, 1867, to the Gaffs, took the admissions stated at the top of page 9 of Record, and rested.

Whereupon the defendant, C. S. Eyster, gave in evidence certified record of the above-named proceedings in bankruptcy. (Rec., p. 9.) Also the above-named bill in chancery to foreclose, filed December 11th, 1868, with exhibits to amended bill, the writ and return in such case, the master's report and proofs taken, the exhibits and papers attached, and also said decree of foreclosure of July 1st, 1870. (Rec., p. 33.) Also the certificate of register in bankruptcy that Meckling was appointed assignee, (Rec., p. 58–9,) and then defendant in ejectment rested. (Rec., p. 59.) Plaintiff then gave in evidence, under exceptions of defendant, the master's certificate of the sale in foreclosure of said lots to the defendants in error in this case, also said master's report of such sale and the confirmation of same by court, and also the said deed to the Gaffs of the master for said lots in suit. (Rec., p. 59.)

The cause was, on this evidence, submitted by an oral agreement, to the court, and the court found defendant guilty as charged, and judgment was rendered in favor of

the plaintiffs, Gaffs, for the lots in suit as such judgment is set forth in Record, pages 3 and 4; and the case was carried on appeal to the Supreme Court, on the bill of exceptions disclosed by the Record, beginning on page 4 and ending on page 65 of Record.

The errors assigned, and on which the case was tried in the Supreme Court of Colorado are in the Record at pages 66 to 68. And the Supreme Court, (see Rec., p. 75,) affirmed the judgment below.

The Record, pages 2 and 3, show that Eyster was sued as a *trespasser, and not as a tenant of McClure*, and the judgment found him guilty. Besides this, there was no proof offered nor in the case, so far as the Record discloses, relating in any way to the nature of Eyster's possession. The only other allusions thereto are at bottom of page 15 and on page 24. But these are mere statements of third persons embodied in the transcript of the record in bankruptcy, introduced by Eyster; and were not offered or received as evidence touching the nature of Eyster's possession. The foregoing, together with the agreement about bill of exceptions on page 73 of Record, is *all* the record discloses touching the nature of Eyster's possession of said lots.

John Meckling, assignee in bankruptcy, filed, on the 6th September, 1873, in the Supreme Court, a petition to be made party and to defend on the appeal in said ejectment suit. On the 13th September, 1873, his petition was refused. At no time before had this assignee ever been, or asked to be made, party either in the ejectment or in the foreclosure case, nor had he made in either of these two cases any application, in any court of any sort, except the application on pages 23, 24, 25 of Record, to have certain rents paid into court as above stated.

The foregoing are, we think, the essential facts of the record on which the errors are assigned in the Supreme Court of the United States.

Assignment of Errors.

The assignment of errors in this court is as follows:

1st. The court erred in holding that under the submission and evidence in the case, the defendants in error were entitled to recover in their ejectment suit.

2d. It erred in passing by all questions as to whether the assignee of McClure was or was not a necessary party to the bill to foreclose, and as to whether the decree given therein after the bankruptcy and without joining him is or is not void.

3d. It erred in holding that the appellees (the defendants in error) were properly permitted to recover in the court below, (the District Court,) *upon their mortgage alone;* and that "this results *necessarily* from the nature of the mortgagee's estate, and the relation of the assignee (in bankruptcy) thereto," notwithstanding the bankruptcy of McClure, and the fact that his whole estate was in the hands of the bankrupt court; that they had not proved their debt therein, nor obtained the authority of that court to proceed thereon, nor made his assignee a party to their bill to foreclose their mortgages; and that from the beginning to the end of their proceedings, they had totally ignored the bankrupt court and its exclusive authority and jurisdiction under the bankrupt law.

4th. It erred in holding that, "where an estate is assigned, (in bankruptcy,) subject to mortgage, it ought not to be said *in any case* that, as *matter of law*, (nothing being shown as to the fact,) the assignee has either the actual or *constructive* possession;' and that, as "in the present case, the appellant (the plaintiff in error) *had not in any way connected himself* with the assignee, (in bankruptcy,) nor shown even that the assignee had ever assumed, or attempted to assume, *the possession* of the premises;" he, as a defendant in the action of ejectment, could not defend his posses-

sion under the outstanding title of the assignee in bankruptcy, without such preliminary and affirmative proof.

5th. It erred in holding that, notwithstanding the bankruptcy of McClure, as shown by the defendant in the action of ejectment, the plaintiffs therein ought to be allowed to proceed and to recover the premises against the defendant—in the absence of additional proof *by him* that the assignee *had not disclaimed* the statutory title and possession of that part of the estate of the bankrupt which had been devolved upon him by law; instead of holding and requiring the evidence of the fact of *such disclaimer* (if it existed and was available) to be made by the plaintiffs, in avoidance of the outstanding title of the assignee, as shown by the defendant; thereby transferring the burden of such proof from the plaintiff to the defendant.

Brief.

We beg the attention of the court, first, to some considerations as to what questions are presented by the record which this court may review.

It will be observed that the court in which this case was tried was substituted for a jury, and tried the issues in the case. (See Record, pages 3–4.) It will also be seen that no special finding of any fact by the court was made in the case, and the only finding of any facts by the court are those in the judgment, (pages 3–4 of Record,) to wit, that the defendant wasguilty, and the plaintiffs are entitled to recover.

It must also be carefully observed that the bill of exceptions does not *profess* to set forth all the evidence that was submitted to the District Court upon this trial. It states certain evidence as that submitted, and that the parties "rested," (Rec., page 9, also 59,) and that the "case was submitted to the court on said evidence." (Rec., p. 59.)

On the 1st of September, 1873, the plaintiff in error and the attorneys for the defendant in error make the agree-

ment touching the bill of exceptions found on page 73. This was done more than a year and a half after the ejectment case was first tried at January term, 1872. (Rec., p. 4.) It was a year and a half after the signing of the only bill of exceptions ever tendered to and signed by the judge, who tried the case, which he did 6th March, 1872. (Rec., p. 65.) It was no part of the bill of exceptions allowed by the judge. *It never was presented to or allowed as part of any bill by any judge or court*, and was no part of the record carried by appeal to the Supreme Court, and there passed upon.

That parties to a suit cannot make their own bill of exceptions, or, by agreement, require either the Supreme Court of Colorado to review a case which was never tried by the court below, nor change the Record without the approval of the judge, so as to present to the court of errors a record for review which no court or judge has ever approved, is not to be denied. To hold otherwise is to allow parties to agree, in the absence of judge and court, upon their own bills of exceptions, and to compel this court to try any case they may make up, no odds how unlike the one actually tried. If decisions on a point so palpable as this were proper to be cited, they will be found in Bethel *v.* Matthews, 13 Wall., 1; Generes *v.* Bonnemer, 7 Wall., 564, 567; Kearney *v.* Case, 12 Wall., 275, 280; Young *v.* Martin, 8 Wall, 357. The bill of exceptions passed upon by the Supreme Court of Colorado must be, and was, one allowed by the judge, and no other. The agreed addition thereto set forth on page 73, the law forbade to be made part of the record, because never allowed, and because presented too late; and for precisely the same reasons that led this court to say in Insurance Company *v.* Comstock, 16 Wall, 270: "This court is not inclined to re-examine any such questions coming up from the District Court, until they have first been passed upon by the Circuit Court," will prohibit this court here from suffering the parties to make for this court, by agreement, a record which they

could not and did not present for review to the Supreme Court of Colorado.

This bill of exceptions must therefore stand as it was allowed and signed March 6th, 1872, if it stands at all; and we are brought to the question, what this record discloses, which this court may review?

LAWS OF COLORADO.

The organic act for Colorado, (12 Stats., 171–2, and which is re-embodied in section 1869 of Revised Stats.,) provides that "writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said District Courts to the Supreme Court, under such regulations as may be prescribed by law. But in no case removed to the Supreme Court shall trial by jury be allowed in said court." * * * "Writs of error and appeals from the final decisions of the Supreme Court shall be allowed, and may be taken to the Supreme Court of the United States, in the *same manner and under the same regulations as from the Circuit Court of the United States*, where the value of the property or the amount in controversy," * * * "shall exceed one thousand dollars."

This is re-enacted in section 1909 of Revised Statutes.

The act of Colorado, section 41, (Revised Stats., p. 513,) provides for appeals in all cases where the judgment, exclusive of costs, amounts to twenty dollars.

Section 22, p. 508, provides that "exceptions taken to the opinions and decisions of the District Courts, *upon the trial of causes*, in which the parties agree that both the matters of law and fact may be tried by the court, and in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly allowed; and the party excepting may assign for error, before the Supreme Court, any decision or opinion so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and evidence."

Section 23 provides for exceptions to the opinion or

decision of district judges, in overruling motions for new trial, and the party excepting "may assign for error any opinion so excepted to."

Section 10 allows the parties to agree that matters of fact and law may be tried by the District Court.

Section , page 509, provides that "the opinion of the justices of the Supreme Court, on any matter pending before it, shall be given in writing, and with the other papers in the case;" but there is nothing making it part of the record, or allowing assignments of error to be made on it.

An inspection of these "regulations, prescribed by the laws" of Colorado, will show that even were it competent for the Colorado Legislature to authorize a jury case, tried by the judge, to be sent, through the Supreme Court of Colorado, into this court, in the shape of a bill of exceptions, embodying all the evidence in mass, *with no other exceptions or assignment of errors than that the evidence did not warrant the general finding and judgment*, and could Colorado thus turn this court into a petit jury and a *nisi prius* judge, yet these laws have not done so. The section (22) simply authorizes, in jury cases tried by the court, error to be assigned on the opinions and decisions excepted to *upon the trial* of cases. There is no attempt here to change the *common law* as to what is a "specific exception;" what is "during the progress of the trial;" what is the office of a "motion for new trial;" nor as to what is "a bill of exceptions."

But we submit the point to this court, without arguing it, that the words in the organic act for Colorado, (12 Stats., 171–2,) "writs of error and appeals from the final decisions of said Supreme Court shall be allowed, and may be taken to the Supreme Court of the United States, *in the same manner and under the same regulations as from the Circuit Courts of the United States*, together with the provision that there shall be no jury trial in the Supreme Court of Colorado, have the effect to bring all jury cases submitted to the District Court judge, *and which the parties*

desired to carry, on error, to this court, under the act of 5th March, 1865, so often commented on by this court in cases like Insurance Co. *v.* Sea, 21 Wall., (13 Stats., 501.) We think this statute is now made applicable to all cases in the Territorial Courts by Revised Stats., sec. 1909, which the parties desire to or can carry to this court. Perhaps the waiver to the jury in the Territories may, in the Territories, be otherwise than in writing. But we submit that this statute of 5th March, 1865, applies to cases to be brought into this court. In other words, if not so conducted as to comply with that statute, they may be all right as judgments, but this court lacks authority to review them. (12 Wall., 284.)

But suppose the law of 3d March, 1865, does not here apply, *as to the manner of waiver of a jury*, then we proceed to inquire, independently of that act, what, in this record, may this court review?

It has been already stated, that in the trial below, not a fact was found specially—no finding whatever—save that the defendant was guilty, and plaintiffs entitled to recover.

An inspection of the assignment of errors in this court will show that none of them refer to or present any question whatever touching the ruling of the court "during the progress of the trial," as distinguished from the final judgment.

These objections shown by the bill of exceptions "arising in the progress of the trial" all related to the admissibility of the evidence. But as to these points no question is, by the assignment of errors here, presented to the court, except, possibly, and by remote inference, the question of admitting the plaintiffs in ejectment to give in evidence the sale, deed, and confirmation in the foreclosure proceeding. This evidence we shall allude to hereafter. Aside possibly from this rebutting evidence, no error is assigned in this court or relied on, except that the evidence in the case did not warrant the finding or judgment of the court. The court was not, by the plaintiff in error, called upon to find specially any fact in the case, neither the fact as to whose

tenant Eyster was, or whether anybody's; when his tenancy began or ended; whether it was subordinate to or antedated the mortgage, or any other special fact. Neither was the court on that trial called upon by defendant therein to find anything as to the question of law arising out of the facts as to the tenancy of Eyster. This whole matter, so elaborately argued in the plaintiff's brief in this court, as to the necessity of the plaintiff in ejectment showing affirmatively that Eyster's tenancy was subordinate to the mortgage, never was specifically made, as the record shows, during that trial; and is specifically made in this court *for the first time*, for the good reason, no doubt, that had it been made on the trial in ejectment the testimony would instantly have been produced (if it was not) showing the mortgage older and superior to any pretense of right by Eyster.

These features of this record being now kept in mind, we return to the inquiry, what questions arising on this record may this court review?

Our first proposition in reply to this inquiry we take from the language of the court in Insurance company *v.* Folsom, 18 Wall., 249: "None of these rules," says the court, "are *new*, as they were established by numerous decisions of this court long before the act of Congress in question was enacted." A similar statement of the condition of the law on this point is in Kearney *v.* Case, 12 Wall., 282, where the court say: "But, as was shown in the recent case of Flanders *v.* Tweed, the court below *had* held that no review of the decision of the court below could be had of any ruling at the trial where the parties had consented to accept the court instead of the jury to decide the issues of fact. *In this state of the law the act of* 1865 *was passed.*"

The rules which are referred to as not "*new* but established by numerous decisions of the Supreme Court," in 18 Wall., 249, are, in that case, carefully stated as follows: "When a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the

court may be either general or special, as in cases where issues of fact are tried by a jury; *but where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial.* Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general; *but the finding of the court, if general, can not be reviewed in this court by bill of exceptions or in any other manner.* Facts found by the jury could only be re-examined *under the rules of the common law*, either by the *granting of a new trial* by the court where the issue was tried, or to which the record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. Nothing, therefore, is open to re-examination in this case except such rulings of the court, *made in the progress of the trial*, as are duly presented by a bill of exceptions. All matters of fact, under such submission, must be found by the Circuit Court, and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the Circuit Court where the suit is brought. Inferences of fact must also be drawn by the Circuit Court, as it is the Circuit Court and not the Supreme Court which by the agreement of the parties is substituted for the jury."

These are the rules which in Insurance Co. *v.* Folsom, 18 Wall., 249, are declared to "*not be new but established by numerous decisions of this court*" prior to the act of 1865.

In Cooper *v.* Omohundro, 19 Wall., 69, the court more explicitly states what is meant by the words "rulings of the court in the progess of the trial." This court there says: "Our decision in that case was, that where issues of fact are submitted to the Circuit Court, and the finding is general, nothing is open to review by the losing party under a writ of error, except the rulings of the court in the progress of the trial; and that the phrase 'rulings of the court during the progress of the trial' *does not include the general findings of the Circuit Court, nor the conclusions of the*

court embodied in such general finding." (See also Bond *v.* Brown, 12 Howard, 256.)

This, therefore, is the rule on this point, applicable to the review on error of all trials of issues of facts by the court in lieu of a jury, as such rule exists in the practice of this court, wholly independent of the act of 3d March, 1865, and before that act was passed. The rule was stated thus in Culler *v.* Emmerling, 22 How., 83, in the syllabus: "Where a case is submitted to the Circuit Court in the district of Louisiana, and the court certifies to the facts which support the plaintiff's claim, the defendant, who took no exceptions in the course of the trial, cannot be permitted here to argue that there was not sufficient evidence to sustain the findings of fact by the Circuit Court." Again, this court in Case *v.* Terrell, 11 Wall., 199, cites Pennock *v.* Dialogue, 2 Pet., 1, decided in 1829, as supporting this rule laid down in these words: "*If all the testimony given were set out*, we could not examine it with the view of determining whether it is sufficient to support the judgment." And the case in 2 Pet., 1, does support this doctrine.

In Town of Ohio *v.* Marcy, 18 Wall., 552, the bill of exceptions embodied all the evidence in the case, and the judgment of the court finding, in lieu of a jury, for the plaintiff. Just as in the case at bar, the question was, did this evidence authorize the verdict or finding? But the court held that the record raised no question of law which this court could review. There were no exceptions during the progress of the trial. In Insurance Company *v.* Sea, 21 Wall., 162, this court says: "Exceptions, to be of any avail, must present *distinctly* and *specifically* the ruling objected to," and cites Young *v.* Martin, 8 Wall., 354, *which was a case, like ours, arising on the record of the Supreme Court of a territory;* and that case lays down this same rule in these words: "To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the point raised, but they must be signed and sealed by the judge." (p. 357.)

These cases establish that, without regard to the statute of 1865, this court will not, in any case, retry upon error a question of fact found by a court in lieu of a jury, where, as in this case, the finding is *general* that the defendant is guilty and the plaintiff entitled to recover; but in such a case will only review such questions of law as the bill of exceptions shows were *specifically* and *distinctly* raised and presented by exceptions, and decided by the court "*in the progress of the trial;*" and that "in the progress of the trial" does not include the general finding or judgment in the case.

If the law were otherwise than we have stated, then all that would be required, in any case in any territory, in order to compel the Supreme Court of the United States to discharge all the functions of a jury, and also all the duties relating to motions for a new trial of a *nisi prius* judge in jury cases submitted to the court, would be for the parties, at the end of the trial, to except, as Eyster did in this case, (see Rec., p. 65,) to the finding and judgment, and to embody the evidence on which the court so found in a bill of exceptions, and on that assign errors as to effect and weight of testimony never named nor thought of during the trial.

Still another consequence of asserting the rule, we here resist, is that it wholly deprives the party of the opportunity of supplying defects of testimony which they might supply, and which it was one of the chief objects of the rule requiring exceptions to be "*specifically and distinctly made during the progress of the trial,*" they should have opportunity to make. If the exception is based on the ground that the proof is insufficient to warrant the general finding of the court, that, too, must be specifically assigned and pointed out, and the attention of the court directed to it, either by exceptions in the progress of the trial or by a motion for a new trial upon that specific ground. This is required, that *the attention of the court* may on the trial be called to the *particular* defect, and may correct it by ordering a new trial. (See Burton *v.* Driggs, 20 Wall.,

133; Iinsurance Co. *v.* Folsom, 18 Wall., 249.) *No motion for a new trial was made in this case.*

Upon the point of the propriety and necessity of asking the court below to decide the specific questions desired to be reviewed in the court of errors, and that unless this is done the reviewing court will not notice that upon which the court below was not specially called upon to rule, we refer to Mays *v.* Fritton, 20 Wall., 417. The court there says, page 418: "To be available here, the objection must be taken in the court below. *Unless so taken, it will not be heard here.*" * * * "This point comes before us at every term, and is always decided the same way." And the court cites 4 Howard, 4; 15 Id., 160; 16 Id., 14; 3 Id., 515; 17 Wall., 19; Id., 409; Id., 412; 18 Id., 237; Id., 552; Id., 436; 15 Id., 151; Id., 472.

We submit that on the authority now presented the only questions which can be reviewed in this case are those presented "during the progress of the trial" and before the judgment; that the exception that the judgment was not warranted by the evidence could only be raised upon and after a motion for a new trial (assigning specifically that ground) had been overruled and exceptions thereon taken; that the general exception on the record, page 65, that the judgment and finding was "then and there excepted to," goes for nought, because such judgment is conclusive of the fact found that the defendant was guilty. (Rec., p. 4.)

Hence, all that is argued in the plaintiff's brief about this finding not being warranted by the evidence, owing to the absence of proof that the defendant's (Eyster's) tenancy was created after and subordinate to the mortgage, has no application in this case, even were the law and the facts of the record as that brief asserts.

No Error in what is Assigned as such.

But we shall now proceed to the inquiries raised by these assignments of error in this court as they are made. Assuming, for the sake of the argument, that this court

may review and consider (what we have shown, we think, it may not do) questions not raised "during the progress of the trial," we will consider the errors assigned in plaintiff's brief, and above set forth.

The 21st rule of this court requires the assignment to set out separately and specifically each error asserted and intended to be urged.

It will be noticed that no mention is made specifically in this assignment of any error as to the admission of any testimony offered by the plaintiff in ejectment; nor is any mention made in this assignment of a single ruling of the court in the progress of the trial in ejectment; nor is any specific mention, nor any general mention, made of the lack of evidence as to the character or date of Eyster's tenancy.

Not one of these is separately or specifically assigned in this court. The last as to evidence about Eyster's tenancy is unnamed, both in the assignment at pages 66–68 of Record, made in the Supreme Court of Colorado, and also in the brief in this case. This point and every other argued in plaintiff's brief, save those assigned in the brief on the opinion of the judge, as found at pages 76, 77, is gotten out of the first assignment of errors, (brief, p. 11,) which is no separate or specific assignment at all, but merely an allegation that the evidence did not warrant the judgment. No assignment is made as to the admission or rejection of evidence, as required by the 6th section of the 21st rule of this court.

Again all the assignments of error in the brief, pages 11 and 12, which are specific, are based not upon errors in the record, but are specifically and by literal quotations directed against an opinion of the judge as found on pages 76 and 77, which is no part of the record.

The practice of this court with regard to the enforcement of the requirements of the 21st rule, is indicated in cases like Treat *v.* Jemison, 20 Wall., 652. The opinion of the court pronouncing the judgment under review is

not the predicate of an assignment of errors, not even where a statute provides for its being filed of record.

By "opinion," we here mean the argument and reasoning of the court in pronouncing the reasons for its judgment. And it is such opinion on which these errors are assigned. When the judge acts also as a jury, the party must have specific *rulings* in the progress of the trial, or on a motion for a new trial, in order to make the courts holdings the predicate of assignments of error.

These assignments of error upon the opinion of the court are therefore most obviously of no avail.

But we now proceed to consider the matters argued in the brief as if they were properly brought before the court.

We have already shown that the matter argued on pages 13 to 17 of the brief, as to the defect in the testimony of plaintiffs in the ejectment trial, owing to the failure of proof about the date of the lease of Eyster, is not in this record, and cannot be reviewed here. What we desire to say additionally on this point we will state in another connection, and we pass to what is said under the subsequent assignment of errors.

These assignments being aimed at what is said in a judge's opinion, and not what is assignable for error as part of the record, we can only discuss it in this light, namely, did the pendency of McClure's proceeding in bankruptcy, *ex propria vigore*, and by operation of law, so transfer the legal title of the said lots to his assignee as that, after the date of the bankrupt's petition, or the appointment of his assignee, the foreclosure suit could not proceed, or as that the assignee must be by complainant made party in the foreclosure suit? Or, on the other hand, might that foreclosure suit proceed, as it did, and a legal title be acquired thereunder at the master's sale.

It would unduly extend this brief to examine in detail the propositions and authorities of plaintiffs in error, and we shall state our own propositions of law upon this point, and our authorities thereon.

As to the extent of interest, title, or property, in the as-

sets of the bankrupt, which by operation of law is vested in the assignee by the act of bankruptcy, and the appointment of the assignee, we state our proposition in the words of Bump on Bankruptcy, 587, (8th edition,) who says: "The bankrupt act does not divest liens acquired and consummated before the adjudication in bankruptcy. When it speaks of the estate of the bankrupt, it means such estate, with all the incumbrances existing upon it at the time of the bankruptcy; in other words, *the net value of the property after the liens upon it are satisfied.* * * * "*The assignee cannot take anything more than the bankrupt had in any case, except in the case of fraudulent conveyances by the bankrupt.*" Ib., p. 478. * * * "Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied for the payment of debts. (Rhoades *v.* Blackiston, 106 Mass R., 334; Blin *v.* Pierce, 20 Vt., 25; Ontario Bank *v.* Munford, 2 Barb. Ch. R., 596; Hynson *v.* Burton, 5 Ark., 492.") Ib., p. 480. The decision of this court in Marshall *v.* Knox, 16 Wall., 559, decides exactly the same thing as to the extent of interest which the assignee takes in property subject, before the bankruptcy, to liens, and in the custody of State courts for the enforcement of the lien. This court there says the assignee "*in such case is only entitled to such* RESIDUE *as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied.*"

The same thing is expressly recognized in Mays *v.* Fulton, 20 Wall., 418, where it is said that only the "SURPLUS *that might arise from a sale under a proceeding in the State court,*" which, the court says, it was the duty of the assignee in bankruptcy to make claim to in the State court.

In Marshall *v.* Knox, 16 Wall., 559, this court declares, in the case of a statutory lien for rents and seizure thereunder by the sheriff in the interest of the landlord, the assignee "in such a case (of levy of execution *before* the petition in bankruptcy) is only entitled to such RESIDUE as

may *remain* in the "sheriff's hands after the debt for which the execution issued has been satisfied."

EFFECT OF THE BANKRUPTCY PROCEEDING.

We next proceed to the question of the legal effect of the proceedings in bankruptcy upon the proceedings to foreclose these mortgages, which had been commenced near two years before, and in which, by order of the chancery court, the master had taken testimony as to the extent of the mortgage lien.

As to this, we maintain the following propositions: (1) That the institution of such proceedings do not *per se* arrest the proceedings nor disturb the jurisdiction of the State court, but the same may proceed to decree sale and confirmation of deed. (2) That it is in such case not the duty of the assignee in bankruptcy to intervene in the State court, unless he has reason to believe that there will be a "residue" left for the creditors after the mortgage liens are satisfied. (3) That it is the duty of the assignee to make the application to intervene and become a party in the State court where such duty exists, and is not the duty of the plaintiff to move in the matter of making him a party. (4) That even where there will be a "surplus" for the creditors after satisfying the mortgage, the case may proceed to judgment decree, sale, and deed, and this without the assignee being a party, and in such case the effect of his not being a party would be that the surplus yielded by the State sale would be subject to the claim of the assignee. As the authorities often blend these various but kindred propositions in the same case, it will be more convenient to present these points together.

Mr. Bump, pages 202, , says: "How far courts in bankruptcy, in the exercise of their jurisdiction, *may* interfere with other courts, is a question that has been much discussed, and is not entirely free from difficulty. They *clearly* have no authority to withdraw cases instituted in other courts before the commencement of proceedings in bankruptcy from these courts, and to proceed to settle and

adjust the claims of parties thereto. Congress could, no doubt, have made an adjudication in bankruptcy operate *propia vigore* to transfer all cases which should be pending in other courts at the time of filing the petition, and to which the bankrupt should be a party, from these tribunals into the courts of bankruptcy. It has not, however, done so. It not only has not deprived the other courts of jurisdiction over such cases, but has provided for their prosecution and defense in the courts by the assignee. This principle applies not only to all ordinary actions to collect debts, but also to proceedings to enforce a lien. The lien of an attachment or the lien of a creditor upon property conveyed in fraud of creditors, or the lien of a partner upon partnership funds, *or the lien created by a mortgage, may be* enforced in other courts when the proceedings for that purpose have been instituted before the commencement of the proceedings in bankruptcy. Having obtained lawful jurisdiction over the parties and subject-matter, they have the right to determine all questions, as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied them." We beg the court's attention to what follows the quotation on pages 203, 204, 205, and 206, and to the numerous authorities there cited.

On the point as to the duty of the assignee to intervene, and who is the "actor" in deciding on his being made a party, we quote the following from pages 205 and 206. He says: "A great many actions have been instituted upon the theory that all the property of the bankrupt must be distributed under the courts of bankruptcy, no matter how it may be situated, but this is *clearly* a mistake. A distinction is to be drawn between proceedings instituted *after*, and proceedings instituted *before*, the filing of the petition. The former are *irregular*, so far as they affect the estate, while in the case of the *latter* there *only* remains a right to liquidate a lien. *But this right is* NEVER *exercised, unless it is shown that the general creditors will be benefited thereby;*" and

to this last he cites *In re* Brown, 1 B. R., 628; S. C. T. L. B., 97; *In re* Irwin Davis, 4 B. R., 716; S. C., 8 B. R. 167; S. C., 1 Saw., 260; *In re* Geo. W. Dillard, 9 B. R., 8 S. C., 6 L. T. B., 90. On page 608 the same author says: "A State court is not divested of its jurisdiction over a pending action *to foreclose a mortgage* by the commencement of proceedings in bankruptcy;" and he cites Lenihan *v.* Hanan, 8 B. R., 557; S. C., 11 B. R., 471; S. C., 14 Abb. Pr., (N. S.) 274; S. C., 55 N. Y. R., 652.

On the point who is to decide and act in the matter of the assignee becoming party to a foreclosure proceeding and the like, Mr. Bump, page 609, says: "When no advantage can result to the estate of a bankrupt, there is no reason why the District Court should interfere with a suit brought in a State Court *after* the commencement of proceedings in bankruptcy, to enforce a lien, when neither the assignee nor any creditor invokes the interference, and it appears without contradiction that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on releasing the right of redemption. There is nothing to be sold, subject to the mortgage which will yield anything, and any action of the District Court for the liquidation and settlement of the amount of the lien, and the sale of the property to satisfy it would be a mere expense to the estate, producing nothing."

This, therefore, holds that in proceedings begun in State Courts to foreclose, the court has jurisdiction, and the assignee and creditors must decide when they will intervene and become parties, and should not where there will be no surplus. Much more is this true, when the State proceeding began before the bankruptcy petition. On page 605 the same authority says: "It is not necessary for the assignee to take any proceeding whatever in regard to encumbered property, unless by doing so he can realize a net sum of money, free from incumbrances, for the benefit of the estate. It would be idle to go through the forms of selling the property, if the property be of less value than the amount of indebtedness; and to this he cites 2 B. R., 426;

1 B. R., 628; 1 L. T. B., 97; 15 Pitts. L. J., 448; *In re* Lambert, 2 B. R., 138. Also *In re* Bebane, 3 Ib., 91, the court held that if the property is mortgaged for more than its value, the assignee has no duties in regard to it. It is precisely for the reason that the assignee has no duties in regard to a proceeding to foreclose in a State court, where the mortgage clearly exceeds the value of the property, that the federal courts will never enjoin the State court, when the property is incumbered for more than its value. That such injunction will never be granted in such a case is settled by scores of cases, and some of them Mr. Bump collects at page 315. Chief Justice Taney, in Norton's Assignee *v.* Boyd, 3 Howard, 437, says: "Where a creditor, by virtue of a special mortgage, *elects to foreclose that mortgage before a State tribunal, the federal court is not called upon to interpose, except in cases where, from the nature of the case, wrong or injustice may be done to other creditors in interest*, or when the mortgage itself may be contested."

But really the recent cases in this court either recognize or decide every one of the above propositions we state. They recognize that the interest that passes to an assignee is the surplus above the lien; that the State courts have jurisdiction to enforce the lien; that the assignee may or may not be made a party in the State court; that if there be a surplus to protect, he is the party to decide that, and to apply for becoming a party, and that his acts in omitting to claim an interest in the State court bars or waives his right in this court to make such claim. These recent cases are

Mays *v.* Fritton, 20 Wall., 414.
Doe *v.* Childress, 21 Wall., 642.
Marshall *v.* Knox, 16 Wall., 551–559.

This last case expressly holds (see page 559) that "where a levy has been made before the commencement of the proceeding in bankruptcy the possession of the officer cannot be disturbed," &c.; and that the interest of the assignee in such property is only the excess above the lien.

Mays *v.* Fritton was a case where a mortgage was, in a State court, foreclosed in July, 1868, on the estate of a bankrupt whose petition was filed 31st January, 1868, the assignee not having made himself a party in the foreclosure proceeding. A surplus of $5,192 was left after the mortgage was satisfied, which, in the State court, the assignee claimed, as against one having a judgment lien on the said mortgaged premises, the sale of which produced the surplus, and the Supreme Court of the State decided the surplus to belong to such judgment lien holder.

Here is a case, therefore, which either recognizes or expressly decides (1) that State courts may proceed to foreclose mortgages on the bankrupt's property *after* his petition in bankruptcy; that at most the assignees' interest is but the surplus after paying liens; that this may be done without the assignee being a party to the foreclosure; that where he omits to become a party, still the foreclosure sale binds him, and his interest is in the "surplus," and that he may make himself a party, and the State's decision binds him.

On page 418 the court says: "The disposition of the surplus that might arise from a sale on such mortgage under the proceeding in the State court, *prima facie*, belonged to the State court. The subject matter was within their jurisdiction and under their control. If special circumstances existed which altered that result, *it was the duty of the party making such claim* (the assignee) to state them, and ask a ruling accordingly."

Doe *v.* Childress (21 Wall., 640) was an attempt by the assignee of a bankrupt to recover in ejectment lands which the defendant in ejectment purchased at a sale made in an attachment proceeding in chancery which was begun ten months before the petition in bankruptcy, but the decree was rendered four months *after* that petition, and the sale was made seven months after the petition was filed. The title of the purchaser at that sale was sustained by this court. This court sustained the proceedings of the State

court from beginning to end, and sustained the title which the proceeding gave the purchaser, *although* the assignee was never a party to that proceeding in chancery. It is true that in this case the attachment was not one named in the 14th section of the bankrupt act as dissolved by the proceeding in bankruptcy, because it was over four months old when the bankrupt's petition was filed. *For this reason this court held this attachment created a lien valid as against the assignee, and one therefore which the State courts could foreclose, and make to the purchaser a perfect title for, without the assignees becoming a party to the chancery suit.*

But the attachment was *no more* than a valid lien. And who will assert that a *bona fide* mortgage made years before the bankruptcy, which has become absolute by default in payment, has gone into the courts in foreclosure near two years before petition in bankruptcy, and is ready for final decree on the master's report, is *any less* a valued and prior lien as against the assignee than is a four months' old attachment proceeding? Such a proposition we think will not be stated in this court. It is simply preposterous to assert that an attachment proceeding in chancery creates a better or more favored lien against the assignee than does a valid mortgage and a chancery proceeding to foreclose it years older than the bankruptcy. Hence, when Doe *v.* Childress decided that such attachment proceeding could go on to consummation in a sale creating a perfect title as against the assignee, though he was never a party, it by necessity decided that our foreclosure proceeding could go on and sell to these defendants in error a perfect title as against the assignee. And such a title said defendants took by the master's deed of 29th May, 1871, (Rec., p. 63–4,) the case of Doe *v.* Childess being judged. On the point as to whose duty it is to make the assignee defendant in the State court, and also on the point as to whether this court meant to say, in Doe *v.* Childress, that an attachment can be foreclosed in a State court as against an assignee, but a mortgage cannot, we invite the attention of the court to what this court says on these points. On

pages 646 and 647 the court says: "When the power of the State court to proceed in a suit is the subject to be impeached, it *cannot be done except upon an intervention by the assignee*, who shall state the facts and make the proofs necessary to terminate such jurisdiction. *This rule gains whether the four months' principle is applicable, or whether it is not applicable.*" In other words, in *all* cases of proceeding in State courts begun before the bankruptcy against a bankrupt's property, it is the assignee who must intervene, make himself a party and produce the proofs to arrest the State proceeding or else they go on without and conclude him.

What the opposing brief says, in the effort to distinguish Doe *v.* Childress from the case at bar, can, of course, have no serious weight. Laches of an assignee in Tennessee, in omitting to make himself a party, can be no greater in its consequences than the *same* omission in Colorado. Besides, neither in Tennessee nor Colorado will the courts let the latches of a mere trustee, in a case like this, cut off the rights of creditors. Besides *caviat emptor* is the law of judicial purchasers both in Tennessee and Colorado, and at such sale a third person is *no more bona fide* purchaser than is any other party whom the law not merely suffers but *invites* to bid. Besides the laches, if any there was, was in this case that of the *assignee* in not making himself defendant in the foreclosure, (21 Wall., 646, &c.,) and was not that of defendants in error; besides there *was* no laches in the case, for the reason that the property was worth $11,310.71 (see Rec. 61) less than the incumbrance, and the right to become defendant is "*never exercised unless it is shown that the general creditors will be benefited thereby.*" (Bump, 205–6.) Besides, the whole position and argument of plaintiffs in error is that, by act and operation of law, the *title* of these lands went over to the assignee, and the *jurisdiction* thereon went to the federal courts; and if this be so in Colorado then it is equally so in Tennessee; and if so in either place, no laches of party creates *jurisdiction* in State Courts to bestow titles over which they have no

jurisdiction. Therefore Doe *v.* Childress, having settled all these points, it ends all this case.

The title, therefore, created by the master's deed of 29th May, 1871, was perfect. It accrued before the ejectment was brought, and it was given in evidence on the trial, subject to the exception that it was irrelevant and not rebutting. This exception is not assigned in the brief, and if it were, it is obviously worthless. The deed was relevant because it showed a perfect title in plaintiffs, acquired before ejectment brought, and because the statute of Colorado declares expressly that in actions of ejectment "it shall be sufficient for him," the plaintiff, "to show a right to the possession of such premises, *at the time of the commencement of the suit, as heir, devisee, purchaser, or otherwise.*" (See Revised Stats. of Colorado of 1868, page 275, sec. 15.) Besides this the same act abolishes fictitious demises.

The time of the demise in the declaration was, therefore, not controlling, and a title acquired before action was, by statute, made available. That the court admitted it in rebuttal, was a matter of discretion in the court, and cannot be assigned as error. (Phil. R. R. Co. *v.* Stimpson, 14 Pet., 448–463; Johnston *v.* Jones, 1 Bl., 210.)

Ejectment on a Mortgage.

But aside wholly from the title created by the master's deed of 29 May, 1871, the right of the defendants in error to recover in the ejectment on their mortgage after default in payment cannot be resisted. Three objections are urged by plaintiff in error to the recovery on the mortgages in the ejectment. (1) That a mortgagee, after condition broken, has not any title, but only a security, and therefore, in this case, the assignee had the title after date of petition for bankruptcy. (2) That the foreclosure merged the mortgage, and therefore the mortgagee could not recover in ejectment. (3) That there was no proof that the mortgage was older than Eyster's tenancy. It is not possible that an argument can be required to show that, in a State where the common law of mortgages is not changed

by statute, such mortgages will recover the premises they embrace in ejectment after default. The first section of the ejectment act (Revised Stats. Col., 278) provides: "The action of ejectment may be brought *in the cases and manner usual at common law*, subject to the provisions hereinafter contained." Fictions are abolished in this act, but there is no provision affecting the right of recovery on mortgages as was usual at common law. Here, therefore, is an express statutory enactment that mortgages after default shall be effectual as means of recovery in ejectment, provided they were such at common law. So that, even were the law of mortgages now become, in this country, what is argued in the opposing brief, such that they will not recover in ejectment, this is not the law or Colorado, because her statutes have enacted that they shall be effectual for recovery, provided they were effectual at common law. This statutory provision becomes part of Colorado land titles, and operates as against assignees in bankruptcy, as well as the rest of mankind. Hence this statute alone is fatal to all that is argued on this point.

But it is an utter mistake to say that a right of recovery in ejectment on mortgages after default has ceased to be the common law of those States where the statutes have not changed the common law.

See Tyler on Ejectments, 751, and cases cited.
1 Hilliard on Mortgages, page 190–194.

The fact that the mortgage, until foreclosure, remains a surity for the debt in the view taken of them in courts of equity, has no effect whatever upon the question as to where the legal title is after default, nor on the right to recover in ejectment. In case of such rocovery and receipt of rents the mortgagee becomes trustee of the legal title, and must, on foreclosure or redemption, account for mesne profits. It is because, in part, his mortgage is a security he may assert that security and recover in ejectment.

As to the position that the decree in foreclosure merged the mortgage, this is not, we believe, seriously relied on in

the opposing brief, and is not there assigned as error at all. But in the trial below it was urged with equal vehemence by defendant in ejectment that the decree of foreclosure merged and extinguished the mortgage, (see 7th assignment in error, Record, p. 67) and that said decree of foreclosure was void, owing to the pending proceeding in bankruptcy. (See 8th assignment, Record, p. 67.)

With a charming simplicity it is insisted, on the same page, that the defendant in ejectment should recover for two equally good reasons: one, that the foreclosure decree was so supremely valid and powerful that it wholly killed off and annihilated the mortgage;a nd the other, that such *decree* and sale thereunder were wholly void. We agree that the two reasons are equally good; and that their "cracked kettle" harmony rather augments than hurts their beauty and excellence.

We have, as we think, abundantly shown that the decree, sale, deed, and confirmation are perfectly valid, and binds the property and carries the title on which we could recover in the ejectment; and that it was not the duty of the assignee in that case to intervene, because "*it would be a mere expense to the estate producing nothing.*" (Bump, 610; 9 Blatch. 320; 1 B. R., 628; 1 L. T. B., 97; 15 Pitts. L. I., 448; 13 Gratt., 15.) We have also shown that if the mortgage was merged, then the very proceeding which worked the merger ended in the master's deed of 29th May, 1871, and its confirmation and order for writ of possession, which gave us the unquestioned and immediate right of possession. But suppose we are wrong in this, and the decrees were, as the 8th assignment below (Rec., 67) says, "void," then our mortgages, as we have shown, are in full force, and on them we were entitled to recover.

The legal consequences of the foreclosure proceeding upon the mortgage, and the consequences of the mortgagee's purchase of the premises at the foreclosure sale, are so accurately stated by the court in Doe *v.* Stockton, 7 Halstead, 322, that we here copy what is there said.

SYLLABUS.—"A mortgagee may maintain an action of ejectment to recover possession of the mortgaged premises. The mortgagee does not divest himself of the right to maintain an ejectment by filing a bill to foreclose, in connection with a second mortgagee, procuring an order of sale, and accepting the sheriff's deed for the premises. If the sheriff's sale is valid, the mortgagee, having become the purchaser, has a right to recover by virtue of the purchase and conveyance. If the sale is not valid, his mortgage title remains."

The court say:

"By bidding at the sheriff's sale and accepting the deed, Jane Hart acknowledged no title inconsistent with her own. That act was intended to come *in aid* of her mortgage and to perfect her title. Such would be its effect if the proceedings are valid. But if they are void, it is not perceived how they could take away her right of action on her mortgage. There is nothing in the nature of these proceedings which divests or suspends the legal estate and right of possession until a sale takes place. By *that* the estate of both mortgagor and mortgagee are transferred to the purchaser. In this case Jane Hart was herself the purchaser, and of course, if the sale was valid, her mortgage title must remain. A mortgagee may bring an action of ejectment pending a bill to foreclose."

So that the result is this: The foreclosure was an act in aid of our mortgage, and during its pendency had no effect on the right to bring ejectment on the mortgage. Our purchase, even if invalid, was an act in aid of the mortgage, and in no way impaired it. If the foreclosure and purchase thereunder were valid, then our title thereunder became perfect, and also the right of possession; and as that antedated the ejectment suit, we could on that recover, as above shown.

The third and remaining point made in the brief (but not made in the assignments of error) against recovery on the mortgage, is that plaintiffs did not prove Eyster's tenancy to be junior and subordinate to the mortgages, nor that it was ended.

We have, as we think, already shown that is impossible

to raise this, (and, indeed, the other points discussed in the opposing brief,) because the point was not raised, ruled upon, or exceptions taken "during the progress of the trial," nor upon motion for a new trial. But suppose the point may be made, is there any error here. To show that there is, the plaintiff cites the proposition from Tyler, that if "the ejectment is against a third person, who holds the mortgaged lands *as tenant of the mortgagor*, it will be necessary to give evidence, in addition to the proof of the mortgage, of the tenancy, and either that the same has determined, or that it was created by the mortgagor subsequently to the execution of the mortgage, although, as before averred in such a case, no notice to quit is made necessary."

If this proposition of law be fully admitted in all its extent its fails to affect this case, for the reasons, among others, which we now state:

There was not offered by defendant in the ejectment suit a particle of evidence as to his possession or tenancy, neither as to its existence, its commencement, end, or character. Even the agreement, on page 73, which we have seen is no part of the record, only says the defendant was in possession at and before the commencement of the ejectment.

The only allusions besides this to this tenancy, disclosed by the record, are in the declaration, (pp. 2–3,) which declare against him as having, on the 1st December, 1869, (long after our mortgages were given) entered into said premises, and unlawfully withholds the possession—on page 15, where McClure's amended schedule in bankruptcy debtors C. S. Eyster $350 for rent of these lots—on page 24, where the assignee's petition to the bankrupt court names C. S. Eyster as one of several tenants owing rents on the mortgaged premises of McClure, not saying what premises, and in the judgment, where the court find defendant guilty as alleged. These are the only allusions in the record to the defendant's tenancy. Of course, it will not be, in this court, pretended that either McClure's statement in his schedule, bottom of page 15, nor Meck-

ling's, on page 24, were any evidence *in the ejectment suit* of the *fact* of tenancy, or anything else. They got into and were offered in the ejectment, not to prove anything as to the tenancy, but only as part of the bankruptcy record, offered to establish the single fact that the lots in question had passed away from the plaintiff by operation of law, and owing to the single fact that the record was offered to show, to wit, the fact and date of McClure's bankruptcy.

Hence, there is not a particle of evidence in this record, nor was there on the ejectment trial, even tending to show that Eyster was ever the tenant of the mortgagor, McClure. There was none to show that he "*claimed*" as tenant of the mortgagor. Even the agreement, on page 73, asserts no such thing. He is declared against as a mere trespasser, and not as tenant of or claiming under the mortgagor. We have no hint in the record of any such tenancy under the mortgagor.

Hence, palpably, the authorities cited on page 16 of opposing brief have no application to the case presented by this record. The only character the record gives defendant was that of a *mere trespasser.* Such the declaration said he was, and such the judgment found him to be; and there the record ends. Now the plaintiff in error comes here, states this point for the first time in the argument in the Supreme Court of the United States, (even leaving it unnamed in their assignment of errors here as well as below,) and then asks this court to inject into the record what is not there, to wit, that Eyster was tenant of McClure, and then, having made that injection, to find error in the record.

The authority cited says: "In case the ejectment is against a third person who holds the mortgaged lands *as tenant of the mortgagor, it will be necessary,*" &c. How does the court know that Eyster held as tenant of mortgagor? The record gives no such information; but, on the contrary, that he was a mere trespasser. And you are asked to presume facts in contradiction of the record so as to find error in the record. Remember that the authorities cited

on this point are not considering the *order* of the proofs. They do not say that in ejectment the plaintiff, in delivering his opening proofs, must show *in every case* not only his title to possession, but must go on and prove whose and what kind of a tenant the defendant is. But the authority cited is speaking of the kind of a case which it states, to wit, a case where the defendant *is the tenant of the mortgagor*, and says, *that being the case*, he must show the additional facts stated.

Suppose the defendant be in fact a mere trespasser, will anybody argue that the plaintiff may not, in opening, rest on the introduction of the forfeited mortgage? Must he go on and show how the defendant got into possession? Most manifestly not. And suppose a record brought into this court simply disclosing that the mortgagor was patentee of the United States, and made to the plaintiff in ejectment a mortgage which was forfeited, and that after forfeiture he declared in ejectment against a stranger as a trespasser, and that on the trial he gave in evidence the patent and the mortgage, and rested; and there the record stops. Is there error in the record because the plaintiff *did not go on and prove that the trespasser was not the tenant of the mortgagor?* We conceive it impossible to so hold. But such, as we have shown, is this record.

If it be said that in taking the position that this record, in the declaration and judgment, gives the defendant character of a mere trespasser, we give him a character in contradiction of the known facts, we reply that the plaintiff in error, in taking the position that our mortgages were junior and subordinate to some lease to Eyster by McClure, takes a position in violation of the known facts, and a position which, had he taken on the trial, would instantly have been defeated by proof that he had no tenancy older than our mortgage.

The difference between the position, on this point, of the plaintiff in error and that of the defendants in error is, that ours is taken *on the facts of the record*, which makes Eyster, as defendant in ejectment, a mere trespasser, whilst

plaintiff in error, in violation both of the record and the facts as they exist outside of the record, assumes that Eyster was shown in the trial to be the tenant of McClure. He was not so shown on that trial, and so the record proves; and he will not here be permitted now to doctor the record, so as to get the benefit of error which neither the facts of the trial below nor the palpable and notorious facts outside of the trial entitle him to have.

We believe what has now been said completely covers all the matters arising on this record, and most respectfully submit that there is no error in the record, and the judgment of the Supreme Court of Colorado must be affirmed.

SHELLABARGER & WILSON,
For Defendants in Error.